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1918

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INDEX

OF

THE NAMES OF CASES DIGESTED.

Abb-And.	COLUMN
Abbott v. Arnton (Que.)	122
Abbott v. Gold Seal Liquor Co (B.C.)	181
Acadia, Re (B.C.)	112
Ackerman v. Ackerman (Alta.)	213
Ackles v. Beatty (N.S.)	508
Acton Tanning Co. v. Toronto Suburban R. Co (Can.)	136
Adolph Lumber Co. v. Meadowcreek Lumber Co (B.C.)	20
Adolph Lumber Co., Meadowcreek Lumber Co. v. (B.C.)	511
Advance Rumely Thresher Co. v. Grenier (Man.)	511
Aetna Life Ins. Co., Lee v. (Que.) 176,	310
Ahlin, Furness, Withy & Co. v. (Can.)	589
Alameda Farmers Elevator & Trading Co., Goldston v. (Sask.)	440
Alberni Land Co. v. Registrar-General of Titles (B.C.)	201
Alberta & Great Waterways R. Co., McCord v. (Can.) 22, 368,	586
Alberta N.W. Lumber Co. v. Lewis (B.C.)	578
Alberta Pacific Grain Co., McIntyre v. (Alta.)	498
Alberta Rolling Mills Co., Christie v. (Alta.)	110
Albertan Publishing Co. v. Munns (Alta.)	362
Albion Motor Express Co. v. City of New Westminster (B.C.) 17,	436
Alexander v. Montreal Tramways Co. (Que.)	3
Alexander, Western Union Fire Ins. Co. v. (B.C.)	112
Algoma Central & Hudson Bay R. Co., Lake Superior Paper Co. v. (Ry. Bd.)	87
Algoma Eastern R. Co., C.P.R. Co. v. (Ry. Bd.)	85
Alie v. Gilmour (Que.)	586
Allan, Re Land Titles Act, and (Alta.)	353
Allan v. Record Printing Co (Ont.)	365
Allard, Aubry v. (Que.) 27, 214,	292
Allen v. Gray (Sask.)	10
Allen, Hassard v. (Ont.)	265
Allen Scott Roofers, Belair v. (Que.)	389
Alliance Films Co., Genzer v. (Que.)	360
"Alliance No. 2," The, Pichon v. (Ex.)	516
Allison, Joseph, The King v. (Ex.)	249
Allison, U.S. of America v. (N.S.)	257
Altermatt, Dierks v. (Alta.) 91,	180
American Fashion Co. v. Lavesque (Que.)	161
Amiot, Ross v. (Que.)	572
Amyot v. Pageau (Que.)	147
Anderson v. C.N.R. Co (Can.)	490
Anderson v. Johnston (Sask.)	371
Anderson v. Norwich Fire Ins. Soc. (Que.)	307
Anderson and Sparks, R. v. (Sask.)	187
Anderson v. Stollery (B.C.)	400
Anderson v. Tps. of Rochester and Mersea (Ont.)	282

And-Avi.	COLUMN
Andrew v. Griffin (Alta.)	50
Andrews v. C.N.R. Co (Sask.)	342
Angelo v. Brennan (Que.)	377
Angrignon v. Mailloux (Que.)	468
Anson v. Stark (Que.)	162
Antonacci, Dufresne v. (Que.)	289
Appelbe v. Windsor Security Co (Ont.)	409
Appleton v. Reynolds (Que.)	268
Archambault, Laplante v. (Que.)	132
Archambault, Maher v. (Can.)	454
Archambeault v. Lapierre and Owens (Que.)	580
Archibald v. The King (Can.)	262
Archibald, R. v. (N.S.)	48
Armand v. Noonan (Ont.)	510
Armour, City of Regina v. (Sask.)	197
Armour & McCarthy, City of Regina v. (Sask.)	197
Armstrong, Re (Ont.)	599
Armstrong Cartage and Warehouse Co. v. G.T.R. Co (Ont.)	560
Arnold v. British Colonial Fire Ins. Co. (N.B.)	307
Arnold v. The Dominion Trust Co (Can.)	310
Arnton, Abbott v. (Que.)	122
Arrears of Taxes Act, Re; Re Land Titles Act (Sask.) 356, 357,	358
Arseneault v. Vachon (Que.)	229
Arthur v. Baillargeon (Que.)	333
Ashkanase v. Darlymple (Que.)	458
Ashwell, Canadian Financiers Trust Co. v. (B.C.)	441
Aspel, Re (Ont.)	600
Asselin v. Ducharme (Que.)	206
Atkinson, Bostrom v. (Man.)	26
Atlas Construction Co., Okopny v. (Que.) 18,	387
Att'y-Gen'l, Gold Seal Co. v. (Sask.)	129
Att'y-Gen'l of Canada v. Massinghill. (Ex.)	482
Att'y-Gen'l of Canada v. Quebec & Saguenay R. Co (Ex.)	493
Att'y-Gen'l for Ontario v. Railway Passengers Assur. Co (Ont.)	105
Aubry v. Allard (Que.) 27, 214,	292
Aubry, Loranger v. (Que.)	220
Aubut v. Gareau (Que.)	477
Audet v. City of Sherbrooke (Que.)	424
Audette v. Heald (Que.)	61
Auger v. Beaudry and Hyde (Que.)	609
"Aurora," The, In re (Ex.)	516
Austin v. Grand Trunk R. Co (Ont.)	488
Austin Hotel Co., Re Winding-up Act, and (B.C.)	97
Austin & Nicholson v. Canada Steamship Lines (Ont.)	134
Auto Garage, Marcotte v. (Que.)	49
Avelsgaard's Case, Re Land Titles Act (Sask.)	354
Avisais, Faust v. (Que.)	338

B.-Bas.] COLUMN

B., D. v. (Ont.) 235, 441
Babayan v. Phœnix Ins. Co. (Ont.) 312
Babb, Michaelson & Sons v. (Ont.) 508
Babinsky v. Wilson (Que.) 49
Bacque Trusts, Re (Ont.) 563
Badeau, Lacouture v. (Que.) 231
Badger v. Torosoff (Sask.) 135
Bagshaw and O'Connor, Re (Ont.) 346, 347
Bahrs & Chapman, Edgar v. (Sask.) 501
Baildon, Rur. Mun. of, Kaufman v. (Sask.) 542
Bailey Cobalt Mines v. Benson (Ont.) 119, 165, 166
Baillargeon, Arthur v. (Que.) 333
Bainbridge, R. v. (Ont.) 187
Baker, Foley v. (Que.) 346
Baker v. Order of Canadian Home Circles (Ont.) 308
Baker v. Richards (B.C.) 360
Baker, Susman v. (Ont.) 144
Baldwin v. Snook (Man.) 58
Ball v. Donnelly (Sask.) 364
Ball and Prefontaine, Rolland, v. (Que.) 596
Ball's Case, Re Investors (Man.) 110
Ballantyne v. Currie (Que.) 268
Bamfield, Bank of Hamilton v. (B.C.) 479
Band v. Sturgeon Consolidated Collieries (Alta.) 139
Banks, Re (Ont.) 310
Bank of Commerce v. Martin (B.C.) 118
Bank of Hamilton v. Bamfield (B.C.) 479
Bank of Hamilton v. Hartery (B.C.) 355
Bank of Hamilton, Holliday v. (Ont.) 267
Bank of Montreal, Hallett v. (N.B.) 235, 561
Bank of Montreal v. Stair (Ont.) 265
Bank of Montreal, Sullivan Machinery Co. v. (B.C.) 503
Bank of Ottawa v. Hamilton Stove and Heater Co. (Ont.) 104
Bank of Toronto v. Harrell (Can.) 264, 559
Bannatyne & Vokes, The King v. (Ex.) 253
Banning, Canada Furniture Co. v. (Man.) 113
Banque d'Hochelaga v. Galibert (Que.) 309
Banque d'Hochelaga v. Hanson (Que.) 61
Banque d'Hochelaga, Royal Bank v. (Sask.) 319
Banque Nationale v. Bourdeau (Que.) 293
Banque Nationale, Gagnon v. (Que.) 513
Banque Nationale v. Jean (Que.) 528
Banque Nationale v. Joncas (Que.) 64
Banque Nationale v. Loiselle (Que.) 309
Bar v. Toronto R. Co. and City of Toronto (Ont.) 530
Barchard & Co. v. Nipissing Coca Cola Bottle Works (Ont.) 96
Barlow, R. v. (Alta.) 93
Barnes, Re (Ont.) 270
Barnett, Re (Ont.) 599
Barrie, Town of, and Garrett, Re (Ont.) 415
Barron v. Kelly (B.C.) 238
Barron v. Kelly (Can.) 578
Barry v. Quinlan (Que.) 348
Bartlet, Menzies v. (Ont.) 136
Bartlett v. Winnipeg Electric R. Co. and C.N.R. Co. (Man.) 73
Bartolucci, A. F. Byers v. (Que.) 273
Bartz' Case; City of Regina v. McCarthy (P.C.) 515
Basil v. Spratt (Ont.) 56

Bas-Bel.] COLUMN

Bastien v. Davis (Que.) 268
Bastien, Dutour v. (Que.) 219
Bastien, Masson v. (Que.) 240
Bathurst Land & Development Co., Crawford v. (Ont.) 106, 111
Battle Island Paper Co. v. Molsons Bank (Que.) 54, 97
Beaconsfield, Town of Drummond v. (Que.) 417
Beaconsfield, Village of, v. Martin (Que.) 4
Beatty, Ackles v. (N.S.) 508
Beatty, Cowansville Hotel v. (Que.) 15
Beatty v. Mansfield (Que.) 264
Beaubier v. Lloyd (Alta.) 270
Beaucage v. Brunette (Que.) 61, 451
Beauchamp v. Patenaude (Que.) 590
Beaudette, The "Ethel Q." v. (Ex.) 24, 100
Beaudin, Poupart v. (Que.) 507
Beaudoin v. Larue (Que.) 38
Beaudry & Hyde, Auger v. (Que.) 609
Beaulieu v. The King (Ex.) 157
Beaulieu v. Pearson (Que.) 290
Beaumier, Village of Daveluyville v. (Que.) 415
Beauport, Parish of, Gaudreau v. (Que.) 426
Beaupre v. Gravel (Que.) 449
Beauvais, Paquette v. (Que.) 498
Beaver Lumber Co. v. Quebec Bank (Sask.) 393
Beaver Valley School District, Trustees of, Lawrence v. (Sask.) 299
Beby v. Schafer (Que.) 336
Beck v. C.N.R. Co. (Alta.) 431
Beck v. The "Kobe" (Ex.) 516
Beck Trusts, Re (Ont.) 563
Bédard, Cassaubon v. (Que.) 58
Bédard v. Notre-Dame-de-Stanbridge (Que.) 221
Bedford, Pixley v. (Sask.) 196
Béique v. Gaston (Que.) 455
Belair v. Allen Scott Roofers (Que.) 389
Belair v. City of Montreal (Que.) 418
Beland v. Quebec Southern R. Co. (Que.) 134
Bélanger, Desjardins v. (Que.) 333, 571
Belanger v. The King (Ex.) 247
Bélanger v. L'Union Mutuelle Des Voyageurs de Commerce (Que.) 305
Belanger v. McDonnell (Que.) 456
Bélanger v. Parish of St. Barnabe (Que.) 422
Belgo-Canadian Pulp & Paper Co. v. Millette (Que.) 384
Bell v. Bell (Ont.) 268
Bell, Ennis v. (N.S.) 201
Bell v. Johnston (B.C.) 47, 401
Bell, Mortgage & Agreement Purchase Co. v. (Man.) 401
Bell v. Quagliotti (B.C.) 155
Bell, Wilson v. (N.B.) 609
Bell Telephone Co. v. City of Ottawa and County of Carleton (Ry. Bd.) 552
Bell Telephone Co. v. City of Windsor (Ry. Bd.) 552
Bell Telephone Co., Joliette Telephone Co. v. (Ry. Bd.) 551
Bell Telephone Co., North Lancaster Exchange v. (Ry. Bd.) 550
Bellamy v. Williams (Ont.) 58

Bel-Bla.] COLUMN

Belleau, National Cartage & Supply Co. v. (Que.) 373
Belleperche, White v. (Ont.) 579
Belleville, Local Board of Health, Simpson v. (Ont.) 173, 431
Belly, Dufresne v. (Que.) 362
Beloeil, Village of, v. Rioux (Que.) 68
Belyea, Ex parte (N.B.) 6
Bemier Glass Co. v. Metal Products Co. (Que.) 114
Benard, Brunelle v. (Man.) 60
Bénard v. Hingston (Can.) 351
Benjamin, The King v. (Que.) 188
Bennett v. Bennett (Ont.) 403
Benson, Re (B.C.) 594
Benson, Bailey Cobalt Mines, v. (Ont.) 119, 165, 166
Benson, Union Bank of Canada v. (Sask.) 62
Benstein v. Jacques (Ont.) 147
Berenstein, R. v. (B.C.) 15
Berg, Carr v. (B.C.) 140, 153
Berg v. Cowie (Sask.) 376
Berger v. Clavel (Can.) 596
Berger, Lampel v. (Ont.) 9
Bergeron, Juneau v. (Que.) 302
Bergeron v. O'Brien (Que.) 15
Berkley, Ibbotson v. (B.C.) 372
Berlin Interior Hardware Co. v. Colonial Investment and Loan Co. (Sask.) 262
Berlin Machine Works v. Randolph (N.B.) 159, 231
Berman Dye Works, Universal Wardrobe Repair, v. (Que.) 582
Berry, The King v. (Ex.) 255
Berry, Walton v. (Sask.) 14
Bertrand, Drouin v. (Que.) 62
Bertrand, The King v. (N.S.) 266
Bertrand v. Pepin (Que.) 163
Bibeau, Traversy, v. (Que.) 585
Bickell, Maloof v. (Ont.) 150
Bickerdike v. Canadian Northern Montreal Tunnel (Que.) 485
Bifrost v. Houghton (Man.) 524
Bigras v. Tasse (Ont.) 261
Bijou Motor Parlors v. Keel (Alta.) 45
Bimel-Ashcroft Mfg. Co. v. Chaplin Wheel Co. (Ont.) 137
Birchenough, Fyfe v. (Que.) 200
Birks, Eden v. (Ont.) 445
Bissette, R. v. (Alta.) 94
Bissonnette, Dupuis, v. (Que.) 582
Bjornstad, Dusbabek v. (Sask.) 317, 452
Black Hill Threshing Syndicate v. Cole (Sask.) 456
Blackett, Mutual Life Ass. Co. v. (Alta.) 400
Blackmore, Edwards v. (Ont.) 105
Blain, Herman & Lawson v. (Sask.) 572
Blais v. Delorme (Que.) 67
Blais v. Mathieu (Que.) 65
Blais v. Quebec Realty Co. (Que.) 473
Blais & Vadeboncœur, The King v. (Ex.) 253
Blais, Vadeboncœur & Blouin, The King v. (Ex.) 253
Blais, Villecourt v. (Que.) 351
Blanchard v. Jacobi (Ont.) 65
Blanchard, Pellerin v. (Que.) 4
Blanshard, Tp. of, Rynd v. (Ont.) 425

Bla-Bra.] COLUMN

Blanshay v. Piche (Que.) 396
Blondin v. Tremblay (Que.) 175
Bloom, Willard v. (Ont.) 616
Blue Funnel Motor Line v. City of Vancouver (B.C.) 411
Blunt, C.P.R. Co. v. (Alta.) 495
Board v. Board (Alta.) 209
Boards of Trade of Western Cities and Canadian Manufacturers Ass'n v. Canadian Freight Ass'n. (Ry. Bd.) 82
Boeckh Brothers, Rubberset Co. v. (Ont.) 555
Boehmer v. Kelly and Selby (Ont.) 563
Boisjoly v. City of Montreal (Que.) 281
Boisjoly v. Land of Montreal (Que.) 577
Boisseau Estate, Re (Man.) 607
Boisvert, Paiement v. (Que.) 163
Boivin v. Les Allumettes de Drummondville (Que.) 512
Bolton, Re (Ont.) 598
Bond v. Sturgeon Consolidated Collieries (Alta.) 139
Bondar v. Usinovitch (Sask.) 206
Bonhomme, The King v. (Ex.) 482
Bonin v. The King (Ex.) 199
Bonneau v. The King (Ex.) 448
Bonner-Worth, Clarkson v. (Ont.) 41
Bonnet, Genereux v. (Que.) 349
Borne, Cantin v. (Que.) 219
Bosomworth, R. v. (Alta.) 26, 558
Boston Law Book Co. v. Canada Law Book Co. (Ont.) 14, 453, 465
Bostrom v. Atkinson (Man.) 26
Botara v. Montreal Locomotive Works (Que.) 238
Botsford, Newton v. (Man.) 23
Bouchard, Brown Corp. v. (Que.) 28
Bouchard, Cimon v. (Que.) 433
Bouchard v. The "Crown of Cordova". (Ex.) 100
Bouchard v. Sorgius (Can.) 16
Boucher, De Repentigny v. (Que.) 568
Boulay, Ouellette v. (Que.) 447
Boulette, Labrecque v. (Que.) 368
Boulter-Waugh v. Phillips (Sask.) 406
Bourassa, Massicote v. (Que.) 496
Bourassa v. Parish of St. Barnabe (Que.) 418
Bourbeau v. Guillemette (Que.) 352
Bourbonnais v. Denis (Que.) 5, 469
Bourdeau, Banque Nationale v. (Que.) 293
Bourdon v. City of Montreal (Que.) 32
Bourdon v. Payette (Que.) 518
Boutet v. Thibideau (Ont.) 300
Bouthiller, Laporte-Martin v. (Que.) 369
Bouthillier, Vanier v. (Que.) 385
Boutry v. North British & Mercantile Ins. Co. (Alta.) 306
Bowen v. C.N.R. Co. (Alta.) 205, 527
Bowes v. Vaux (Ont.) 574
Bowles v. City of Toronto (Ont.) 282, 423
Bowles v. City of Winnipeg (Man.) 423
Bowles, The King v. (Ex.) 249
Boyd, Imperial Bank v. (Ont.) 269
Boyd v. Larson (Sask.) 442
Boyer v. The King (Ex.) 435
Bracci, R. v. (Ont.) 93
Bradburn, The King v. (Ex.) 254
Bradshaw v. Conlin (Ont.) 48
Brand v. National Life Ass'ce Co. (Man.) 30

Bra-Bru.] COLUMN

Brander v. Reid.....(Que.) 168
Brandon v. Plimley.....(B.C.) 502
Brankley v. McManus, Rex ex rel.(Alta.) 330
Brantford, Tp. of, Delbridge v....(Ont.) 216
Bratts Lake, Rur. Mun. of, v. Hudson's Bay Co.....(Sask.) 182, 539, 541
Braun v. Peters.....(Sask.) 139
Breckenridge, Estate, Re.....(Alta.) 241
Bredin v. Canadian Northern Town Properties.....(Alta.) 544
Breeko, Shewecsuk v.....(Alta.) 497
Brennan, Angelo v.....(Que.) 377
Brenner v. Consumers Metal Co.....(Ont.) 152, 198
Brenton, The King v.....(Ex.) 248
Brentwood Realty Co. v. Surveyor.(Que.) 469
Brenzel and Rabinovitch, Re.....(Ont.) 573
Brien v. Robert.....(Que.) 359
Brisson, Legault v.....(Que.) 201
British Canadian Fur Co. v. Cohen (Que.) 9
British-Canadian Fur & Trading Co., Cole v.....(Ont.) 117
British Colonial Fire Ins. Co., Arnold v.....(N.B.) 307
B.C. Electric R. Co., City of Vancouver v.....(B.C.) 414
B.C. Electric R. Co., Howard v...(B.C.) 444
B.C. Electric R. Co., Jackson v...(B.C.) 560
B.C. Electric R. Co., McFeeley v..(B.C.) 173
B.C. Express Co., G.T.P.R. Co. v.(Can.) 585
B.C. Granitoid Co. v. Dominion Shipbuilding Eng. & Dry Dock Co.(B.C.) 393
B.C. Independent Undertakers v. Maritime Motor Car Co.....(B.C.) 19
B.C. Pressed Brick, Komnick System Sandstone Brick Mach. Co. v (Can.) 120
B.C. Securities v. Mutual Life Ass'ce Co.....(B.C.) 19, 262
British Dominion's Gen. Ins. Co., Shepard & Merchants Bk. v.....(Sask.) 316
Broderick v. McKay.....(Ont.) 55
Brodeur v. Duclos.....(Que.) 520
Brodeur and Prudential Trust Co., Cuddy v.....(Que.) 200, 449
Brodeur, Richard Young Co. v....(Que.) 478
Brodie v. Chipman.....(Can.) 595
Brosseau, Goodwins Ltd. v.....(Que.) 466
Brousseau v. The King.....(Can.) 185
Brown Corp., Rheault v.....(Que.) 366
Brown v. Cadwell.....(B.C.) 114
Brown, Cruso v.....(Ont.) 408
Brown v. Dupuis.....(Que.) 463
Brown, Keith v.....(Ont.) 156
Brown, Shannahan v.....(Ont.) 501
Brown v. Touks.....(Ont.) 220
Brown v. Winterbottom.....(Que.) 174
Brown Corp. v. Bouchard.....(Que.) 28
Brown Corp. v. Carrier.....(Que.) 386
Brown's Travel Bureau v. Taylor.(B.C.) 309
Browne, Hamilton Motor Works v.(Ont.) 483
Brunelle v. Benard.....(Man.) 60
Brunelle v. G.T.R. Co.....(Ont.) 492
Brunet, Guertin v.....(Que.) 291
Brunet v. The King.....(Can.) 179, 234
Brunet, R. v.....(Que.) 21
Brunette, Beaucage v.....(Que.) 61, 451
Brunstetter v. Zushing.....(Alta.) 476
Brunswick Balke Collender Co., Smith v.....(B.C.) 432

Buc-Cam.] COLUMN

Buck v. The King.....(Can.) 257
Buckley Drouin Co. v. Mayhew...(Que.) 464
Buckley v. Vair.....(Ont.) 27
Bulletin Co. v. Sheppard.....(Can.) 363
Burdeau v. Dominion Bridge Co..(Que.) 384
Bureau, Marcil v.....(Que.) 140
Bureau v. Soulard.....(Que.) 221
Burford Coal and Grain v. McPherson..(Ont.) 151
Burgar, Reinhart v.....(Ont.) 152
Burgeson, Robinson v.....(Sask.) 504
Burkett v. Ott.....(Ont.) 134
Burns v. Fielding.....(N.S.) 323
Burns v. Godson.....(B.C.) 345
Burns v. Henderson.....(Alta.) 205
Burns v. Johnson.....(B.C.) 483
Burns, Pinkerton v.....(Que.) 459
Burritt v. Stone.....(Sask.) 138
Burtner Coal Co. v. Gano Moore and C.P.R.....(Que.) 162, 233, 371, 462
Burton v. Cundle.....(Ont.) 63
Burton, Huff v.....(Ont.) 63, 557
Bury, Douglas v.....(Ont.) 135
Buscombe Securities Co. v. Windebank.....(B.C.) 5
Bush, Merchants Bank v.....(Can.) 53
Business Realty v. Loew's Hamilton Theatres.....(Ont.) 218
Butler and McLorg v. City of Saskatoon.....(Sask.) 419, 421
Butterworth and City of Ottawa Re.....(Ont.) 414
Buxton, Fieldhouse v.....(Alta.) 339
Byers, A. F. v. Bartolucci.....(Que.) 273
Byrne, Gentles v.....(Ont.) 165

C. & E. Townsites, City of Wetaskiwin v.....(Alta.) 412, 544
Cadwell, Brown v.....(B.C.) 114
Cady, The King v.....(N.B.) 321
Cailloux v. Houde.....(Que.) 449
Caldbick & Pierce, Maple Leaf Lumber Co. v.....(Ont.) 166, 360
Calder v. International Harvester Co.....(Sask.) 405, 561
Caledonia Milling Co. v. Johns....(Ont.) 296
Calgary Brewing & Malting Co., Rogers v.....(Can.) 61
Calgary, City of, v Canadian Western Natural Gas Co.....(Can.) 421
Calgary, City of, v Dominion Radiator Co.....(Can.) 392
Calvin, R. v.....(Alta.) 186
Camden, Township of, Freeman v .(Ont.) 218
Cameron, Canadian Mtge. Investment Co. v.....(Can.) 318
Cameron v. C.P.R. Co.....(Sask.) 379
Cameron v. Church of Christ; Re Orr...(Can.) 595
Cameron, McMillan v.....(B.C.) 135
Cameron, R. v.....(N.S.) 57
Campbell v. Campbell.....(Ont.) 213
Campbell's Case, Re Waterloo Local Bd. of Health.....(Ont.) 29, 445
Campbell v. Dominion Elevator Co.....(Man.) 205
Campbell v. Halvorsen.....(Sask.) 11
Campbell v. Morgan.....(Man.) 332
Campbell, Mercantile Trust Co. v.(Ont.) 133

Cam-Can.] COLUMN

Campbell v. Nelles.....(Que.) 453
Campbell's Pharmacy, R. v.....(Sask.) 324
Campbell, Town of Macleod v....(Can.) 545
Campbell and Town of Rainy River, Re.....(Ont.) 420
Campbellford, Lake Ontario & Western R. Co., Noble v.....(Ry. Bd.) 24
Campeau v. Roy.....(Que.) 318
Canada Basket Co., Town of Wiarton v.....(Ont.) 407
Canada Bonded Attorney v. Leonard.....(Ont.) 25
Canada Bonded Attorney v. Leonard-Parmiter.....(Ont.) 25, 107, 376
Canada Box Board Co., Jourdain v. (Que.) 390
Canada Cement Co., Patenaude v. (Que.) 391
Canada Cement Co., Tremblay v..(Que.) 390
Canada Cheese Box Co. v. Canadian Freight Ass'n.....(Ry. Bd.) 83
Canada Foundry Co. v. Edmonton Portland Cement Co.....(P.C.) 159, 198
Canada Foundry Co., Henry Hope & Sons v.....(Ont.) 151
Canada Furniture Co. v. Banning (Man.) 113
Canada & Gulf Terminal R. Co. v. The King.....(Can.) 16
Canada Hail Ins. Co. v. McIsaac. (Sask.) 305
Canada Investment v. Town of Scotstown.....(Que.) 416
Canada Law Book Co., Boston Law Book Co. v.....(Ont.) 14, 453, 465
Canada Law Book Co. v. Yule...(Sask.) 134
Canada National Fire Ins. Co. v. Hutchings.....(P.C.) 110
Canada National Ins. Co., Doherty v.....(Sask.) 304
Canada Steamship Lines, Austin & Nicholson v.....(Ont.) 134
Canada Wire and Cable Co. v. Grant.....(Ont.) 467
Canadian Bank of Commerce v. Eye.....(Sask.) 176, 207
Canadian Bank of Commerce v. La Brasch.....(Sask.) 451
Canadian Bank of Commerce v. Martin.....(B.C.) 118
Canadian Bank of Commerce, Roy v.....(B.C.) 53
Canadian Bank of Commerce v. Won Foo.....(Alta.) 98
Canadian Car & Foundry Co., Marconi Wireless Telegraph Co. v.....(Que.) 299
Canadian Collieries v. Dixon.....(Can.) 378
Canadian Consolidated Rubber Co. v. Seidman.....(Que.) 360
Canadian Explosives and Land Registry Act, Re.....(B.C.) 495
Canadian Financiers Trust Co. v. Ashwell.....(B.C.) 441
Canadian Freight Ass'n., Boards of Trade of Western Cities & Can. Mfgs. Ass'n v.....(Ry. Bd.) 82
Canadian Freight Ass'n, Canada Cheese Box Co. v.....(Ry. Bd.) 83
Canadian Freight Ass'n, Dominion Canners v.....(Ry. Bd.) 82
Canadian Freight Ass'n., Dominion Millers Ass'n v.....(Ry. Bd.) 87

Can-Can.] COL

Canadian Freight Ass'n., Graham Co. v.....(Ry. Bd.)
Canadian Freight Ass'n., Horne Co. v.....(Ry. Bd.)
Canadian Freight Ass'n. v. Montreal Board of Trade.....(Ry. Bd.)
Canadian Freight Ass'n., Ontario Fruit Growers Ass'n v.....(Ry. Bd.)
Canadian Freight Ass'n., Premier Coal Co. v.....(Ry. Bd.)
Canadian Freight Ass'n., Toronto Bd. of Trade v.....(Ry. Bd.)
Canadian Freight Ass'n., Wallaceburg Cut Glass Works v.....(Ry. Bd.)
Canadian General Securities Co. v. George.....(Ont.)
Canadian Gossard Co. v. Dominion Corset Co.....(Ont.)
Canadian Heating and Ventilating Co. v. T. Eaton Co. and Guelph Stove Co.....(Ont.)
Canadian Klondyke Mining Co., O'Sullivan v.....(Yukon)
Canadian Light & Power Co., Vinet v.....(Que.) 136,
Canadian Moline Plow Co. v. Trea. (Alta.)
Canadian Mortgage Investment Co. v. Cameron.....(Can.)
Canadian Northern Construction Co., Gibb v.....(B.C.)
Canadian Northern Montreal Tunnel, Bickerdike v.....(Que.)
Canadian Northern Pacific R. Co. v. Corp. of Kelowna.....(B.C.)
Canadian Northern Quebec R. Co. v. Desmarais.....(Que.)
Canadian Northern R. Co., Anderson v.....(Can.)
Canadian Northern R. Co., Andrews v.....(Sask.)
Canadian Northern R. Co., Beck v. (Alta.)
Canadian Northern R. Co., Bowen v.....(Alta). 205,
Canadian Northern R. Co., City of Maisonneuve v.....(Ry. Bd.)
Canadian Northern R. Co., Cole v.....(Ry. Bd.)
Canadian Northern R. Co., Fraser v.....(Man.)
Canadian Northern R. Co., Haney v.....(Man.)
Canadian Northern R. Co., Hartin v.....(Ry. Bd.)
Canadian Northern R. Co., International Bridge & Terminal Co. v..(Ry. Bd.)
Canadian Northern R. Co., Johnson & Carey Co. v.....(Ont.)
Canadian Northern R. Co., Lalande v.....(Ry. Bd).
Canadian Northern R. Co. v. Ouseley, Chisholm and Thomson.....(Sask.)
Canadian Northern R. Co., Prouse v.....(Man.)
Canadian Northern R. Co., Security Traffic Bureau v.....(Ry. Bd.)
Canadian Northern R. Co., Sullivan v.....(Ont.)
Canadian Northern R. Co. v. Union Land Corp.....(Que.)

Can-Can.] COLUMN

Canadian Northern R. Co. v. Wilson....(Man.) 379
Canadian Northern R. Co., Worsley v...(Sask.) 232
Canadian Northern Town Properties, Bredin v....(Alta.) 544
Canadian Pacific R. Co. v. Blunt.(Alta.) 495
Canadian Pacific R. Co., Cameron v....(Sask.) 379
Canadian Pacific R. Co., Cantillon v...(Que.) 435
Canadian Pacific R. Co., Cheeseman v..(N.B.) 25, 170
Canadian Pacific R. Co., City of Chatham v....(Ry. Bd.) 88
Canadian Pacific R. Co., City of Montreal v....(Ry. Bd.) 488
Canadian Pacific R. Co., Cleugh v.(B.C.) 25
Canadian Pacific R. Co., Dawson v (B.C.) 491
Canadian Pacific R. Co. v. Ferrari.(Que.) 385
Canadian Pacific R. Co., General Traffic Service Co. v....(Ry. Bd.) 84
Canadian Pacific R. Co., G.T.P.R. Co. v....(Ry. Bd.) 81
Canadian Pacific R. Co., Hay v..(Sask.) 74
Canadian Pacific R. Co., Montreal Bd. of Trade v....(Ry. Bd.) 77
Canadian Pacific R. Co., Nelson v.(Can.) 486
Canadian Pacific R. Co., O'Brien Bros. v....(Ry. Bd.) 488
Canadian Pacific R. Co., Panetta v.(B.C.) 199
Canadian Pacific R. Co., Patterson v....(Alta.) 123
Canadian Pacific R. Co., Pesha v..(Ont.) 74
Canadian Pacific R. Co., Province of Manitoba v....(Ry. Bd.) 551
Canadian Pacific R. Co., Provincial Stone & Supply Co. v....(Ry. Bd.) 86
Canadian Pacific R. Co., Pyne v..(Man.) 74
Canadian Pacific R. Co., Regina Bd. of Trade v....(Ry. Bd.) 82
Canadian Pacific R. Co. v. Saskatoon and Moose Jaw Boards of Trade....(Ry. Bd.) 81
Canadian Pacific R. Co., Scanlin v.(Man.) 75
Canadian Pacific R. Co., Southern Alberta Hay Growers v....(Ry. Bd.) 86
Canadian Pacific R. Co. and Spanish River Pulp & Paper Mills v. Algoma Eastern R. Co....(Ry. Bd.) 85
Canadian Pacific R. Co. v. The "Storstad"....(Can.) 6, 99
Canadian Pacific R. Co., Trainshi v....(B.C.) 28, 351
Canadian Pacific R. Co. v. Walker (Can.) 489
Canadian Puget Sound Lumber Co., Michigan Trust Co. v....(B.C.) 116, 182, 405
Canadian Sand and Gravel Co. v. The "Keywest"....(Ex.) 99
Canadian Steel Foundries, Stychlinsky v....(Que.) 206, 386
Canadian Tube & Iron Co., Sayed v....(Que.) 390
Canadian Western Natural Gas Co., City of Calgary v....(Can.) 421
Canadien Athletique Club and Finlayson, Re....(Que.) 118

Can-Cha.] COLUMN

Canadien Club Ltd., Durocher v....(Que.) 113, 175
Cantillon v. C.P.R. Co....(Que.) 435
Cantin v. Borne....(Que.) 219
Cantin v. The King....(Ex.) 192
Cape Breton Elec. Light Co., O'Hendley v....(N.S.) 441
Cape Breton Elec. R. Co., Steele v (N.S.) 557
Carbonneau, O'Neil v...(Que.) 275, 277, 537
Caressa v. David....(Que.) 15
Carette Co., Pare v....(Que.) 231
Caron v. Couture....(Que.) 70
Caron v. Imperial Oil Co....(Que.) 386
Caron, Therriault v....(Que.) 387
Carr v. Berg....(B.C.) 140, 153
Carr v. Imperial Oil Co....(Sask.) 383
Carr & Staffen, Gwillim v....(Sask.) 171
Carrier, Brown Corp. v....(Que.) 386
Carrieres De Beauport, The King v.(Ex.) 252
Carroll, Ex parte....(N.B.) 35, 276
Carroll, Conroy v....(Que.) 214
Carson v. Martin....(Ont.) 519
Carson v. Raifman....(Que.) 46
Carswell, R. v....(Ont.) 326
Carter, Re....(Ont.) 599
Carver, R. v....(Alta.) 190
Case, J. I., Threshing Machine Co. v. Mitten....(Sask.) 505
Case, J. I., Threshing Machine Co. v. Welsh....(Sask.) 504
Cassaubon v. Bédard....(Que.) 58
Catholic Mutual Benefit Ass'n, Traynor, Re....(Ont.) 314
Catholic Order of Foresters, Dalziel v....(Que.) 309
Cedars Rapids Mfg. & Power Co., Marleau v....(Que.) 255
Central Canada Express Co., Spaner Bros v....(Alta.) 76
Chadderton, R. v....(Alta.) 126
Chagnon v. Rameau....(Que.) 43
Chalmers v. Machray....(Can.) 70
Chamandy, Struthers v....(Ont.) 40
Chamberlain, Nichols & Shepard v....(Sask.) 502, 505
Champagne v. Jackson....(Que.) 470
Champion & White v. City of Vancouver....(Can.) 584
Chandler v. City of Vancouver....(B.C.) 415
Chaplin Wheel Co., Bimel-Ashcroft Mfg. Co. v....(Ont.) 137
Chapman, Re....(Ont.) 297
Chapman v. Petry....(Que.) 176
Chaput v. Duquette....(Que.) 278
Chaput v. Legault....(Que.) 369
Chaput, Poplis v....(Que.) 48
Charbonneau, Legault v....(Que.) 462
Charbonneau, Robert v....(Que.) 338
Charest v. Gervais....(Que.) 63
Charest, Sénécal v....(Que.) 4, 168
Charland v. Lamaire....(Que.) 334
Charlebois v. Charlebois....(Que.) 458
Charlebois, Lachine, Jacques-Cartier and Maisonneuve R. Co. v....(Que.) 256
"Charles, S. Neff," The, Johnson v. (Nos. 1 and 2)....(Ex.) 6
Charlot, Peters v....(N.B.) 35
Charron v. Walker....(Que.) 45, 500
Chartrand, Dussault v....(Que.) 49

Cha-Coh.] COLUMN

Chartrand, Latchford v. (Ont.) 130
Chatham, City of, and Chatham Board of Trade v. C.P.R. Co. (Ry. Bd.) 88
Chatham, City of v. G.N.W. Telegraph & Bell Telephone Cos. (Ry. Bd.) 550
Chatham Gas Co., Lewis v. (Ont.) 301
Chatham Gas Co., Union Natural Gas Co. v. (Can.) 141
Cheeseman v. C.P.R. Co. (N.B.) 25, 170
Chenier, Daly v. (Que.) 363
Chevanelle, Julien & Co. v. (Que.) 449
Chilliwack Evaporating & Packing Co. v. Chung (B.C.) 15, 18
Chipman, Brodie v. (Can.) 595
Choma v. Chmelyk (Alta.) 576
Choquette v. Parish of Varennes (Que.) 428
Christie v. Alberta Rolling Mills Co. (Alta.) 110
Christner, Mason & Risch v. (Ont.) 509
Christopherson, Gault's Ltd. v. (Sask.) 237
Christopherson and Sask. Guarantee, Seinbaine v. (Sask.) 42
Chung, Chilliwack Evaporating & Packing Co. v. (B.C.) 15, 18
Chung Chan, R. v. (B.C.) 329
Church of Christ, Cameron v. Re Orr (Can.) 595
Cimon v. Bouchard (Que.) 433
Clark v. City of Winnipeg and Winnipeg Elec. R. Co. (Man.) 283, 285
Clark v. Hepworth (Can.) 474
Clark, Maritime Coal, R. & Power Co. v. (N.B.) 503, 506
Clark, Northern Shirt Co. v. (Ex.) 458
Clark, Rush v. (N.B.) 560
Clarke, R. v. (Alta.) 93
Clarkson v. Bonner-Worth (Ont.) 41
Clarkson v. Dominion Bank (Ont.) 53, 54
Clarkson v. McLean (Ont.) 243
Clavel, Berger v. (Can.) 596
Clavelle v. Russell (Sask.) 568
Cleeve, The, v. The Prince Rupert (Ex.) 198
Clegg v. Macdonald (Man.) 373
Clement v. Northern Navigation Co. (Ont.) 435
Clement, Sparks v. (Ont.) 137
Clements v. National Man. Co. (Sask.) 97, 435
Clermont and Chabot, Haeck v. (Que.) 8
Clermont, Goyette v. (Que.) 301
Cleugh v. C.P.R. Co. (B.C.) 25
Cleveland Stove v. Walters (Que.) 59
Cliche, Rheaume v. (Que.) 536
Cloutier v. Corp. of Notre Dame (Que.) 425
Cloutier v. Trudel (Que.) 59
Clow, Lewis Miller & Co. v. (N.S.) 234
Coal Transportation Facilities, Re (Ry. Bd.) 83
Coates, Morse Co-Operative Supply Co. v. (Sask.) 110
Coates, Vanzant v. (Ont.) 201
Cobalt, Town of, Temiskaming Telephone Co. v. (Ont.) 550
Cochrane, Schetky & Acadia v. (B.C.) 204
Coe v. Mayberry (Sask.) 48
Cogne v. City of Montreal (Que.) 422
Cohen, British Canadian Fur Co. v. (Que.) 9
Cohen, Deuscher v. (Que.) 239

Coh-Cos.] COLUMN

Cohen v. Turgeon (Que.) 39
Cohoe, McCallum v. (Ont.) 288, 289
Cole, Black Hill Threshing Syndicate v. (Sask.) 456
Cole v. B.C. Fur and Trading Co (Ont.) 117
Cole v. C.N.R. Co. (Ry. Bd.) 89
Cole, Pemberton v. (Alta.) 575
Coleman, Toronto and Hamilton Highway Commission v. (Ont.) 163
Coleman and Toronto and Niagara Power Co., Re (Ont.) 249
Collector of Revenue v Verret (Que.) 50
Collery, Devine v. (Ont.) 262
Collins v. Guardian Casualty Co. (B.C.) 308
Colloway, Hamilton v. (Alta.) 162
Colonial Investment v. McManus (Sask.) 411
Colonial Invest. and Loan Co., Berlin Interior Hardware Co. v. (Sask.) 262
Colonial Investment & Loan Co. v. Richardson & McMeans (Man.) 400
Colonial Investment & Loan Co. v. Smyth (Sask.) 399
Colonial Real Estate Co., Montreal General Hospital v. (Que.) 477
Colonial Toy & Show Case and Richards & Organ v. Maurice (Que.) 119
Colwell, Montreal Abattoirs Ltd. v. (Que.) 467
Comeau, Dumaine v. (Que.) 508
Commercial Properties v. Leduc (Que.) 349
Computing Scale Co. v. Fortin (Que.) 301
Comtois v. Pesant (Que.) 512
Condola, R. v. (Ont.) 327
Confederation Life Ass'n, Moore v. (B.C.) 162, 305
Confederation Life Ass'n, Uren v. (Ont.) 440
Conklin v. Dickson (Ont.) 348
Conlin, Bradshaw v. (Ont.) 48
Connell, Jarvis v. (Ont.) 69
Connolly, Hudon v. (Que.) 572
Conrad v. Halifax Lumber Co. (N.S.) 302, 444
Conroy v. Carroll (Que.) 214
Consolidated Investments, Re, Simon's Case (Alta.) 112
Consolidated Mining & Smelting Co., Endersby v. (B.C.) 171
Consolidated Plate Glass Co. v. McKinnon Dash Co. (Ont.) 198
Consumers Metal Co., Brenner v. (Ont.) 152, 198
Contant v. Pion (Que.) 210
Continental Bag and Paper Co., Mills v. (Ont.) 147
Continental Light and Heat Co., School of St. Alphonse v. (Que.) 516
Contrecoeur, Corp. of, Fortin v. (Que.) 545
Conway v. Conway (Ont.) 213
Conway, Farnell v. (N.B.) 442, 527, 591
Cook v. Hinds (Ont.) 103
Coomber, Laurencelle v. (Que.) 11
Coop v. Robert Simpson Co. (Ont.) 441
Cooper, Giannini v. (B.C.) 181
Corbet Foundry, McTavish v. (Ont.) 151
Corby Distillery Co. v. O'Meara (Que.) 111
Corner, Penberthy v. (Ont.) 156
Cortesi, Farquharson v. (B.C.) 164
Cossey v. McManus (N.S.) 63

Cot-Cur.] COLUMN

Cote, Duranceau v. ..... (Que.) 474
Cote, The King v. ..... (Ex.) 252
Coté v. Morin ..... (Que.) 277
Cote, Taillon v. ..... (Que.) 47
Cotter, Re ..... (Ont.) 601
Cotton v. Leighton ..... (B.C.) 285
Coulombe v. Rouillard ..... (Que.) 501
Cournoyer v. Corp. of Richelieu. (Que.) 180
Court Recorder, Fraser v. ..... (Que.) 330
Court Recorder, Montreal Abattoirs v. .. .. (Que.) 494
Courteau v. The King ..... (Ex.) 192
Courville, Trust & Loan Co. v. .. (Que.) 340
Cousineau, Drolet v. ..... (Que.) 210
Cousineau v. Séquin ..... (Que.) 584
Coutlée v. Hétu ..... (Que.) 23, 211
Couture, Caron v. ..... (Que.) 70
Couture v. Guerin ..... (Que.) 21
Cowan v. Ferguson ..... (Ont.) 299
Cowan v. The "St. Alice" ..... (Ex.) 516
Cowansville Hotel v. Beatty. ..... (Que.) 15
Cowie, Berg v. ..... (Sask.) 376
Cowlin and Son, York Sand and Gravel v. ..... (Ont.) 134
Cox v. Cox ..... (Alta.) 215
Coyne, R. v. ..... (Alta.) 370
Craig, Estate of, Re ..... (N.S.) 594
Craig v. Gibault ..... (Que.) 302
Cranston, Molsons Bank v. ..... (Ont.) 272
Cranston, Town of Oakville v. .... (Can.) 285
Crawford Estate, Re ..... (B.C.) 549
Crawford v. Bathurst Land and Development Co ..... (Ont.) 106, 111
Crawford, Smith v. ..... (Sask.) 19, 576
Credit Foncier Franco-Canadien Co., Re; Re War Relief Act ..... (Alta.) 399
Creed v. Jones Bros. & Co ..... (Sask.) 1
Creelman, Hudson Bay Ins. Co. v. (B.C.) 106
Creighton, R. v. ..... (Alta.) 322
Crepeau v. Gareau ..... (Que.) 450
Crepeau, Lemieux v. ..... (Que.) 179
Cristall v. McKernan ..... (Alta.) 557
Cromie, De Schelking v. ..... (B.C.) 364
Crompton Corset Co. v. City of Toronto ..... (Ont.) 424
Cromwell v. Morris ..... (Alta.) 13
Cronquist, Johansson v. ..... (Alta.) 353
Crosland, A. J. Reach Co. v (Ont.) 219. 539
Cross, R. v. ..... (Ont.) 208
Crouchman, Graham v. ..... (Ont.) 452, 580
Crowell v. Nickerson ..... (N.S.) 198
"Crown of Cordova," The, Bouchard v. ..... (Ex.) 100
Crown Life Ass'ce Co., Dufresne v. ..... (Que.) 14, 316
Crown Steamship Co. v. The "Lady of Gaspé" ..... (Ex.) 100
Crown Tailoring Co., Dominion Paper Box Co. v. ..... (Ont.) 162
Cruso v. Brown ..... (Ont.) 408
Cuddy v. Brodeur and the Prudential Trust Co ..... (Que.) 200, 449
Cudmore and Law Union & Rock Ins. Co., Re ..... (Sask.) 411
Cummings v. Silverwood ..... (Sask.) 319
Cundle, Burton v. ..... (Ont.) 63
Cunningham, Ex. Parte ..... (Que.) 595
Cunningham v. Kelly ..... (Ont.) 403
Currie, Ballantyne v. ..... (Que.) 268

Cur-Del.] COLUMN

Currie v. Harris Lithographing Co. .... (Ont.) 524, 525
Currie v. Rur. Mun. of Wreford (Sask.) 474
Curry v. Girardot ..... (Ont.) 408
Curry, Smith v. ..... (Man.) 218
Cushing, McDonald Co. v. ..... (B.C.) 519
Cusson, Gagnon v. ..... (Que.) 363
Cyr v. Cyr ..... (Que.) 33
Cyr, R. v. ..... (Alta.) 343, 535, 566

D, Re ..... (Ont.) 303
D. v. B. ..... (Ont.) 235, 441
Dagenais, Duclos v. ..... (Que.) 292, 337
Dagenais, Mountain Sights v. ..... (Que.) 571
Dagenais, Rapid Motor Co. v. .... (Que.) 50
Daigle Estate, Re ..... (Alta.) 391
Daigle, Gagne v. ..... (Que.) 366
Dallaire v. Leclerc ..... (Que.) 107
Dalton v. Dominion Trust Co. (B.C.) 104, 564, 565
Daly, Re ..... (Ont.) 608
Daly v. Rev. Chenier ..... (Que.) 363
Dalziel v. Catholic Order of Foresters ..... (Que.) 309
Dambrosio v. City of Montreal. . (Que.) 423
Dandy, Stevenson v. ..... (Alta.) 228
Danforth Glebe Estates v. Harris & Co. ..... (Ont.) 445
Dannecker v. International Securities Co ..... (Ont.) 579
Dansereau v. Dubois ..... (Que.) 572
Dansereau, Racine v. ..... (Que.) 214
Daoust v. Houde ..... (Que.) 38
Darche v. The Parish of St. Mathias ..... (Que.) 415
Darlymple, Ashkanase v. ..... (Que.) 458
Darwish, Rohoel v. ..... (Alta.) 20, 233
Daveluyville, Village of, v. Beaumier ..... (Que.) 415
David, Caressa v. ..... (Que.) 15
Davidson, Goltman v. ..... (Que.) 301
Davie v. N.S. Tramways & Power Co. ..... (N.S.) 437
Davies, Taylor v. ..... (Ont.) 42, 563
Davies, Wm., Montreal Abattoirs v. ..... (Que.) 510
Davis, Bastien v. ..... (Que.) 268
Davis & Findlay, The King v. ..... (Ex.) 253
Davis, Leroy v. ..... (Que.) 172
Davis and Moss, Re ..... (Ont.) 574
Davis v. Whittington ..... (Ont.) 568
Dawson v. C.P.R. Co. ..... (B.C.) 491
Dawson v. Jago ..... (Que.) 63
Debard, R. v. ..... (Ont.) 57
Debardeurs, Les, Syndiques du Port de Montreal, Poliquin v. ..... (Que.) 106
Décarie, City of Montreal v. ..... (Que.) 427
Decarie, Prudhomme v. ..... (Que.) 449
Deeb, Horton v. ..... (Que.) 511
De Felice v. O'Brien ..... (Que.) 509
Delahanty v. City of Montreal. . (Que.) 425
Delaney, Dillabough v. ..... (Sask.) 410
Delangie v. Montreal Machine Shop ..... (Que.) 387
De Laval Dairy Supply Co. v. Nichol ..... (Sask.) 97
Delbridge v. Tp. of Brantford. .... (Ont.) 216
Delisle v. Village of Roberval .... (Que.) 427
Delorme, Blais v. ..... (Que.) 67

De L-Dom.] COLUMN

De Luca v. Hare....(Ont.) 364
Del Solo v. City of Montreal....(Que.) 371
Denault, Laporte v....(Que.) 230
Denault v. Stewart....(Que.) 112
Denault v. Tps. of Mansfield and Pontefract....(Que.) 284, 374
Denis, Bourbonnais v....(Que.) 5, 469
Denis v. Deschamps....(Que.) 577
Denis v. Montreal Investment & Realty Co....(Que.) 578
Denis, Robidoux v....(Que.) 460
Denny, Thompson v....(B.C.) 165
De Repentigny v. Boucher....(Que.) 568
De Sambor, Gauthier v....(Que.) 359
Desautels v. Laramée....(Que.) 291
Desautels v. Mailoux....(Que.) 211
Desautels v. Montreal Light & Power Co. and City of Montreal....(Que.) 421
Deschamps, Denis v....(Que.) 577
Deschatelets v. School Comm'rs of Sault au Recollet....(Que.) 182
De Schelking v. Cromie....(B.C.) 364
De Schelking v. Zurbrick....(B.C.) 167
Deseronto, Town of, McAfee v....(Ont.) 285
Desève, Trester v....(Que.) 153
Desjardins v. Belanger....(Que.) 333, 571
Desjardins, Mignault v....(Can.) 473
Desmanches, Lacaille v....(Que.) 447
Desmarais, Canadian Northern Quebec R. Co. v....(Que.) 493
Desmarteau, Duchess Amusement Co. v....(Que.) 171, 174, 348
Desnoyers, Tie Tie v....(Que.) 352
Desormeaux v. Dupre....(Que.) 386
Destrempes, Michaud v....(Que.) 294
Deuscher v. Cohen....(Que.) 239
Devall v. Gorman....(Alta.) 264, 499
Devine v. Callery....(Ont.) 262
DeVisscher v. Weir....(Sask.) 580
Diamond Vale Supply Co., Mather & Noble v....(B.C.) 168
Diamond v. Western Realty Limited....(Ont.) 576
Diamonde Metal Co. v. Standard Paint Co....(Que.) 512
Dickenson's Case, Re Land Titles Act....(Sask.) 357
Dickson, Conklin v....(Ont.) 348
Dickson v. Podersky....(Alta.) 319
Dierks v. Altermatt....(Alta.) 91, 180
Di Francesco, R. v....(Ont.) 443
Dillabough v. Delaney....(Sask.) 410
Dinardo v. Payette....(Que.) 341
Dingle v. World Newspaper Co....(Ont.) 364
Dinsmore v. Philip....(B.C.) 228, 472
Dion, Hudson Bay Co. v....(Que.) 527
Dionne v. The King....(Ex.) 192
Dixon, Canadian Collieries v....(Can.) 378
Dodge, Robinson v....(Man.) 435
Doherty v. Canada National Ins. Co....(Sask.) 304
Doherty, The King v....(N.B.) 325
Dolph, London and Western Canada Investment Co., v....(Ont.) 579
Dolson v. Jones....(Ont.) 265
Dominion Bank, Clarkson v....(Ont.) 53, 54
Dominion Bank, Samuels v....(Ont.) 470
Dominion Bridge Co., Burdeau v. (Que.) 384

Dom-Dro.] COLUMN

Dominion Canners v. Canadian Freight Ass'n....(Ry. Bd.) 82
Dominion Chain Co. v. McKinnon Chain Co....(Ex.) 457
Dominion Corset Co., Canadian Gossard Co., v....(Ont.) 555
Dominion Corset Co., Treo Co. Inc. v....(Ex.) 458
Dominion Creosoting Co., Geall v (Can.)....166, 531
Dominion Creosoting Co. v. Nickson Co....(Can.) 104
Dominion Creosoting Co., Salter v....(Can.) 166, 531
Dominion Elevator Co., Campbell v....(Man.) 205
Dominion Elevator Co. v. Union Bank....(Man.) 466
Dominion Harvester Co., Kokomo Investment Co. v....(Alta.) 155
Dominion Millers Ass'n v. Canadian Freight Ass'n....(Ry. Bd.) 87
Dominion Millers Ass'n v. G.T. and C.P. R. Cos....(Ry. Bd.) 85
Dominion Natural Gas v. National Gas Co....(Ont.) 141
Dominion Paper Box Co. v. Crown Tailoring Co....(Ont.) 162
Dominion Radiator Co., City of Calgary v....(Can.) 392
Dominion Reduction Co., Peterson Lake Silver Cobalt Min. Co. v....(Ont.) 398
Dominion Shipbuilding Engineering & Dry Dock Co., B.C. Granitoid Co. v....(B.C.) 393
Dominion Tanneries, Woodstock Elec. R.L. & P. Co. v....(N.B.) 36
Dominion Trust Co., Re....(B.C.) 129, 564
Dominion Trust Co., Arnold v....(Can.) 310
Dominion Trust Co. and Boyce, Re....(B.C.) 115
Dominion Trust Co., Dalton v....(B.C.)....104, 564, 565
Dominion Trust Co. v. Mutual Life Assurance Co....(B.C.) 19, 262
Dominion Trust Co. v.New York Life Ins. Co....(P.C.) 5, 26, 117,314
Doner v. Western Canada Flour Mills Co....(Ont.) 157
Donnelly, Ball v....(Sask.) 364
Dorion v. G.T.R. Co....(Que.) 74
Doucet, Leithead v....(Que.) 478
Dougan, Montreal Tramways Co. v....(Que.) 342
Douglas v. Bury....(Ont.) 135
Douglas v. Citv of Regina....(Sask.) 283
Douglas v. McKay....(N.S.) 351
Douglas v. Mutual Life Ass'ce Co (Can.) 407
Douglas v. Smart....(Ont.) 238
Dowler v. Edwards....(Alta.) 60
Dowson v. Toronto and York Radial R. Co....(Ont.) 560
Doyle v. City of Westmount....(Que.) 436
Drake, R. v....(N.S.) 50
Drapeau v. Recorder's Court....(Que.) 16, 415
Drolet v. Cousineau....(Que.) 210
Droney, Tropox v....(Alta.) 521
Drouin v. Bertrand....(Que.) 62

Dru-Eak.] COLUMN

Drummond v. Town of Beaconsfield ....(Que.) 417
Drummondville, Les Allumettes de, Boivin v....(Que.) 512
Dubeau, Maillet v....(Que.) 484
Duberger v. Morkill....(Que.) 91
Dubois, Dansereau v....(Que.) 572
Dubois, Rousseau v....(Que.) 372
Dubreuil v. Bank of Montreal...(Que.) 53
Dubuc, Franco-Belgium Investment Co. v....(Alta.) 167
Dubuc v. Pigeon....(Que.) 294
Duchaine v. Matamajaw Salmon Club ....(Que.) 220
Duchaine v. Trudel....(Que.) 154
Ducharme, Asselin v....(Que.) 206
Duchess Amusement Co. v. Desmarteau ....(Que.) 171, 174, 348
Duchow, Saba v....(Que.) 180, 347
Duclos, Brodeur v....(Que.) 520
Duclos v. Dagenais....(Que.) 292, 337
Duell v. Oxford Knitting Co....(Ont.) 205
Dufresne v. Antonacci....(Que.) 289
Dufresne v. Belly....(Que.) 362
Dufresne v. City of Montreal....(Que.) 256
Dufresne v. Crown Life Ass'ce Co. (Que.) 14, 316
Dufresne v. Dufresne (Que.) 298, 462, 581
Dufresne v. Parent....(Que.) 316
Duggan v. Howard....(Que.) 175
Duggan v. McCauley....(Ont.) 472
Duhamel & C.P.R. Co., Girard v..(Que.) 179
Duhamel v. Graves....(Que.) 512
Duhamel, Sahekik v....(Que.) 43
Dulude, Lamothe....(Que.) 519
Dumaine v. Comeau....(Que.) 508
Dumas v. Le Clair....(Man.) 447
Dumesnil, Théberge v....(Que.) 32
Dumont, R. v....(Que.) 235
Dumoulin, Longpre v....(Que.) 27, 419
Duncan, R. v....(Ont.) 186
Duncan, The King v....(Ex.) 252
Dunham v. Marsden....(N.B.) 443, 470
Dunlop v. Ellis....(Ont.) 605
Dunlop, E. & N. R. Co. v (B.C.) 22, 28, 469
Dunnett v. The King....(Ex.) 438
Duplessis v. Edmonton Portland Cement Co....(Can.) 62
Dupre, Desormeaux....(Que.) 386
Dupuis v. Bissonnette....(Que.) 582
Dupuis, Brown v....(Que.) 463
Dupuis v. Malo....(Que.) 211
Dupuis, Snitzler Advertising Co. v.(Ont.) 1
Duquette, Chaput v....(Que.) 278
Duranceau v. Cote....(Que.) 474
Durant v. Ontario and Minnesota Power Co....(Ont.) 434
Durocher v. Le Club Champetre Canadien Ltd....(Que.) 113, 175
Dusabek v. Bjornstad....(Sask.) 317, 452
Dussault v. Chartrand....(Que.) 49
Dussault and Pageau v. The King.(Ex.) 145
Dutour v. Bastien....(Que.) 219
Dutremblay v. Lanouette...(Que.) 454, 525
Duval v. Wade....(Que.) 618

Eagle Publishing Co., Wiseman v. (Que.) 339
Eakins v. Town of Shaunavon...(Sask.) 281

Ear-Eri.] COLUMN

Earl Grey, School Dist. of, McDonald v. ....(Man.) 5, 15
East v. Harty....(Ont.) 288
East Greenfield Park v. Montreal & Southern Counties R. Co. (Ry. Bd.) 88
East Williams, Tp. of, Witherspoon v. ....(Ont.) 419
Eastern Canada Fisheries v. McIntosh ....(Que.) 119
Eastern Tolls, Re....(Ry. Bd.) 78
Eastview Public School Bd. v. Tp. of Gloucester....(Ont.) 515
Eastview, Town of, v. R.C. Episcopal Corp....(Ont.) 90
Eastwood, Garrison v....(Ont.) 364
Eaton Co. and Guelph Stove Co., Can. Heating and Ventilating Co. v.(Ont.) 19
Economic Realty Co. v. Ellis...(Que.) 182
Eden v. Birks....(Ont.) 445
Edgar v. Bahrs and Chapman...(Sask.) 501
Edgar, Karch v....(Ont.) 213
Edmonton Brewing & Malting Co., Re (Alta.)....54, 113, 115, 118
Edmonton, City of, G.T.P.R. Co. v. ....(Alta.) 541
Edmonton, City of, Stringer v...(Alta.) 422
Edmonton, Dunvegan & B.C. R. Co., Re ....(Ry. Bd.) 77
Edmonton, Dunvegan & B.C.R. Co., Newman v....(Ry. Bd.) 85
Edmonton Milling Co., Ritchie v. (Alta.) 404
Edmonton Portland Cement Co., Canada Foundry Co. v.....(P.C.) 159, 198
Edmonton Portland Cement Co., Duplessis v....(Can.) 62
Edmonton School District, Smiles v. ....(Alta.) 430
Edwards v. Blackmore....(Ont.) 105
Edwards v. City of Sydney.....(N.S.) 24
Edwards, Dowler v....(Alta.) 60
Edwards, Ferris v....(Ont.) 523
Edwards & Wynne, Re....(Ont.) 29
Egbert v. Northern Crown Bank..(P.C.) 273
Elder Ebano, Co. v. Ville de Maisonneuve....(Que.) 149, 150
Electric Specialty, Perkins Electric v. ....(Ont.) 151
Electrical Development Co. v. Queen Victoria Niagara Falls Park..(Ont.) 465
Eliot, Merchants Bank v.....(Eng.) 122, 399
Elliott, Re....(Ont.) 240, 245
Elliott v. Elliott....(Ont.) 290
Elliott v. Forrester.....(Man.) 267, 347
Elliott v. Winnipeg Electric R. Co.(Can.) 283
Ellis, Dunlop v....(Ont.) 605
Ellis, Economic Realty Co. v....(Que.) 182
Ellis v. Graile....(Que.) 464
Emerson Brantingham Implement Co., Schofield v....(Can.) 504
Employers Liability Ass'ce Co., N.S. Tramways Co. v....(N.S.) 306
Endersby v. Consolidated Mining & Smelting Co., ...(B.C.) 171
England v. Lamb....(Ont.) 244
Ennis v. Bell....(N.S.) 201
Equitable Fire & Marine Ins. Co., Taylor v....(Alta.) 36, 308
Equitable Realty v. Roy.....(Que.) 463
Erickson v. McFarlane.....(Ont.) 167

Ern-Fis.	COLUMN
Ernesttown Tp., Hogle v. (Ont.)	525
Erskine Estate, Re (Alta.)	301
Esquesing, Tp. of, Noble v. (Ont.)	469
Esquimalt & Nanaimo R. Co. v. Dunlop (B.C.)	22, 28, 469
Esquimalt & Nanaimo R. Co. v. McLellan (B.C.)	483
Esquimalt & Nanaimo R. Co. v. Treat (B.C.)	200
Essex Terminal R. Co. v. G.T., M.C., Wabash & N.Y.C.R. Co.'s. (Ry. Bd.)	87
"Ethel Q.", The, v. Beaudette (Ex.)	24, 100
Etter v. City of Saskatoon (Sask.)	47
Evans v. Corp. of Richmond (B.C.)	333, 435, 557
Evans, Newcombe v. (Ont.)	592
Evans v. Ogdensburg Coal Co. (Que.)	518
Evans v. Slayton (Que.)	594
Execution Act, Re; Gregory Princeton Collieries (B.C.)	525
Express Traffic Ass'n. City of Toronto v. (Ry. Bd.)	84
Eye, Canadian Bank of Commerce v (Sask.)	176, 207
Eyer, Ferguson v. (Ont.)	142
Factories Ins. Co., Gagne v. (Que.)	21
Factories Ins. Co., Mathys v. (Que.)	342
Fafard v. City of Quebec (Can.)	424
Fairweather v. Foster (N.B.)	341
Fairweather v. McCulloch (Ont.)	133
Fanning v. Wales (Ont.)	509
Farlinger, The King v. (Ex.)	250
Farm Products v. Macleod Flouring Mills (Alta.)	224
Farmers' Advocate v. Master Builders' Co. (Man.)	144
Farnell v. Conway (N.B.)	442, 527, 591
Farnell v. Parks (Alta.)	589
Farquharson v. Cortesi (B.C.)	164
Farquharson, Robert Bell Engine & Thresher Co. v. (Sask.)	501
Farragher, Yeo. v. (Man.)	365
Farrell v. The "White" (Ex.)	517
Faucher v. Hébert (Que.)	280
Faulkners, Re (Ont.)	500
Faust v. Avissais (Que.)	338
Fawcett, Ex parte (N.B.)	90
Faye v. Roumegous (Ont.)	457
Feathers, Poitras Woolen Mills v. (Que.)	340
Felger, Van Dorn v. (Alta.)	292
Ferguson, Cowan v. (Ont.)	299
Ferguson v. Eyer (Ont.)	142
Ferrara v. National Surety Co. (Can.)	478
Ferrari, C.P.R. Co. v. (Que.)	385
Ferring, Tarrabian v. (Can.)	346
Ferris v. Edwards (Ont.)	523
Ferron, Naud v. (Que.)	222
Fesserton Timber Co., Mortimer v. (Ont.)	39
Fidelity Trust Co. v. Hall (Sask.)	580
Fieldhouse v. Buxton (Alta.)	339
Fieldhouse v. City of Toronto (Ont.)	425
Fielding, Burns v. (N.S.)	323
Findlay, Howard v. (Que.)	456
Fiola, R. v. (Que.)	517
Fisher, Scott v. (Ont.)	507
Fishman, Home Loan & Mtge. Co. v. (Que.)	168

Fit-Fre.	COLUMN
Fitz Randolph v. Fitz Randolph (N.B.)	211
Flaherty v. Malepart (Que.)	277
Flaherty and Malepart, The King v. (Que.)	277
Fleet v. The King (Can.)	16
Fleetwood v. Welton (N.B.)	41
Fletcher v. Fletcher (Sask.)	210
Fleury, Ouimet v. (Que.)	269
Flexlume Sign Co. v. Globe Securities Co. (Ont.)	173
Flood v. Sparling (Que.)	210
Florence, Mason v. (Ont.)	407
Foley v. Baker (Que.)	346
Foley v. Lipson (Ont.)	574
Foley, McIlwee v. (B.C.)	23, 195
Folick v. Wabash R. Co. (Ont.)	492
Fonciere Victoriaville, Perrault v. (Que.)	571
Fong Quing and Fong Toy, R. v. (N.S.)	328
Fontaine v. The King (Ex.)	487
Fontaine v. Paradis (Que.)	385
Foote, R. Hoe Co. v. (Que.)	500
Forbes v. Lumbers (Ont.)	475
Ford, Town of, Manie v. (Ont.)	424
Forest v. Montreal Tramways Co. (Que.)	206
Forget v. Forget (Man.)	9
Forget v. Laferte (Que.)	67
Forget, Moscovitch v. (Que.)	38
Forrester, Elliott v. (Man.)	267, 347
Forsyth v. Walpole Farmers Mutual Fire Ass'ce Co. (Ont.)	306
Fort Frances, Town of, and Stinson, Re (Ont.)	417
Fortier, Lacasse v. (Que.)	92, 534
Fortin, Computing Scale Co. v. (Que.)	301
Fortin v. Corp. of Contrecoeur (Que.)	545
Fortin v. Montreal Tramways Co. (Que.)	430, 531, 559
Foster, Fairweather v. (N.B.)	341
Foster and Rutherford, Re (Ont.)	574
Fox, R. v. (Alta.)	526
Fox v. Patrick (Ont.)	62
Foxwell v. Policy Holders Mutual Ins. Co. (Ont.)	308
Foy, Re (Ont.)	240
Fradette v. The King (Ex.)	367
Francis v. Wilkerson (B.C.)	43
Franco-Belgium Investment Co. v. Dubuc (Alta.)	167
Franco-Belgium Investment Co. v. McNamara (Alta.)	206
Franco-Canadian Mtge. Co. v. Greig and Thirlaway (Can.)	472
Franklin v. Reardon (Can.)	134
Franz, Hansen v. (Can.)	575
Frappier, Laplante v. (Que.)	230
Fraser, Re (N.S.)	236
Fraser v. C.N.R. Co. (Man.)	490
Fraser v. Court Recorder (Que.)	330
Fraser & Gallagher, O'Brien v. (N.B.)	394
Fraser, Gordon v. (Ont.)	403
Fraser, The King v. (Sask.)	184
Fraternal Order of Eagles, Hoyes v. (B.C.)	267
Frechette v. Patenaude (Que.)	210
Freedman v. City of Winnipeg (Man.)	284
Freehold Investment Co. v. Westland (Man.)	570
Freeman v. Montreal Locomotive Works (Que.)	382

Fre-Gau.] COLUMN

Freeman v. Tp. of Camden.....(Ont.) 218
Freinstein, Paulin v.....(Man.) 45
Friedman v. St. Charles.....(Que.) 196
Frind v. Frind.....(Ont.) 211
Frontenac Electric Laundry, Laferriere v.....(Que.) 390
Fruchtenan v. Gurofsky.....(Ont.) 562
Fugere v. The King.....(Ex.) 251
Fulton, Re.....(Ont.) 597
Fulton v. Mercantile Trust Co...(Ont.) 169
Fulton v. Randall, Gee & Mitchell.....(Alta.) 11
Furness, Withy & Co. v. Ahlin...(Can.) 589
Fyfe v. Birchenough.....(Que.) 200

Gabel v. Howick Farmers Mutual Fire Ins. Co.....(Ont.) 307
Gaetz v. Jarvis.....(Alta.) 287
Gagne v. Daigle.....(Que.) 366
Gagne v. Factories Ins. Co.....(Que.) 21
Gagnon v. Banque Nationale....(Que.) 513
Gagnon v. Cusson.....(Que.) 363
Gagnon, Gauthier v.....(Que.) 286
Gagnon v. The King.....(Ex.) 383
Gagnon v. Lemay.....(Can.) 579
Gagnon, Morency v.....(Que.) 44
Gale v. Lacroix.....(Que.) 548
Galibert, Banque d'Hochelaga v..(Que.) 309
Galibert v. Recorder's Court.....(Que.) 495
Galibert, Schinck v.....(Que.) 389
Galibert v. Vaillancourt.....(Que.) 46
Gallagher v. City of Montreal....(Que.) 176
Gallagher v. Toronto R. Co.....(Ont.) 49
Gallagher v. Woodman.....(Ont.) 593
Gano Moore Co. and C.P.R., Burtner Coal Co. v...(Que.) 162, 233, 371 462
Garand v. Kastner.....(Que.) 268
Garbutt, Richmond School Dist. v.....(Alta.) 548
Gardiner v. Merker.....(Ont.) 506
Gardiner v. Muir.....(Sask.) 59, 451
Gardner Estate, Re.....(B.C.) 606
Gardner v. Holmes.....(B.C.) 346
Gareau, Aubut v.....(Que.) 477
Gareau, Crepeau v.....(Que.) 450
Garneau, City of Montreal v.....(Que.) 427
Garnett v. Garnett.....(N.B.) 289
Garnison Club of Quebec v. Lavergne..(Que.) 99
Garrett v. City of Moose Jaw...(Sask.) 381
Garrett, Guardian Ass'ce Co. v..(B.C.) 102
Garrett and Town of Barrie, Re..(Ont.) 415
Garrison v. Eastwood.....(Ont.) 364
Garson, Harris v.....(Ont.) 332
Gaston, Bèique v.....(Que.) 455
Gatchell, Thompson v.....(Ont.) 522
Gates' Case, Re Municipal Act...(B.C.) 544
Gaudreau v. Parish of Beauport..(Que.) 426
Gault's Ltd. v. Christopherson...(Sask.) 237
Gauthier v. Gagnon.....(Que.) 236
Gauthier v. The King.....(Can.) 31
Gauthier v. Lamarre.....(Que.) 17
Gauthier v. Laviolette.....(Que.) 37
Gauthier v. Lowe.....(Que.) 467
Gauthier v. Patenaude.....(Que.) 37
Gauthier v. de Sambor.....(Que.) 359
Gauvin v. Legault.....(Que.) 72
Gauvreau, Page v.....(Que.) 280

Gav-Gla.] COLUMN

Gavin v. Kettle Valley R. Co.....(B.C.) 439, 442
Gazey v. Toronto R. Co.....(Ont.) 530
Geall v. Dominion Creosoting Co.....(Can.) 166, 531
Gearhart v. Kraats.....(Sask.) 162
Gearhart v. Quaker Oats Co....(Sask.) 68
Gélinas v. Gerbeau.....(Que.) 340
General Accident Fire & Life Assur. Co., Rogers v.....(Ont.) 308
General Financial Corp. v. Le Jeune.....(Sask.) 478
General Financial Corp. v. Wood & McGregor.....(Alta.) 400
General Traffic Service Co. v. C.P.R. Co.....(Ry. Bd.) 84
Genereux v. Bonnet.....(Que.) 349
Gentles v. Byrne.....(Ont.) 165
Genzer v. Alliance Films Co.....(Que.) 360
George, Canadian General Securities Co. v.....(Ont.) 141
Georgeson v. Moodie.....(Alta.) 363
Georgetown Collieries, Ripka v..(Alta.) 27
Gerard v. Ottawa Gas Co.....(Ont.) 432
Gerbeau, Gélinas v.....(Que.) 340
Germain v. Hébert.....(Que.) 217
Germain v. Ryan.....(Que.) 362
German v. City of Ottawa.....(Can.) 436
Germania Fire Insurance Co., Pachal v.....(Sask.) 312, 451
Gerow v. Hughes.....(Ont.) 156
Gervais, Charest v.....(Que.) 63
Gervais, Laberge v.....(Que.) 567
Gettins, Lett v.....(Sask.) 355
Giannini v. Cooper.....(B.C.) 181
Gibault, Craig v.....(Que.) 302
Gibb v. Canadian Northern Construction Co.....(B.C.) 137
Gibb v. The King.....(P.C.) 250
Gibbons v. Hatfield.....(N.B.) 444
Gibbs v. Northern Construction Co.....(B.C.) 443
Giguère v. Pagnuelo.....(Que.) 62
Giguère v. Tobin Mfg. Co.....(Que.) 433
Gilbert Bros. Engineering Co. v. The King.....(Ex.) 71
Gilbertson, Richardson v.....(Ont.) 69
Gillespie v. McKeen.....(Sask.) 160
Gilmour, Alie v.....(Que.) 586
Gingras v. Maher.....(Que.) 268, 499
Gingras, St. Denis v.....(Que.) 397
Ginsberg, Re.....(Ont.) 610
Girard v. Duhamel and C.P.R. Co.....(Que.) 179
Girard v. Godin.....(Que.) 361
Girard, Wayagamack Pulp & Paper Co. v.....(Que.) 438
Girardot, Curry v.....(Ont.) 408
Girouard, Roy v.....(Que.) 214
Girouard, Waxman v.....(Que.) 175, 396
Giroux v. The King.....(Can.) 187
Giroux v. Martin.....(Que.) 231, 269
Giroux v. Quebec Montreal & S.R. Co..(Que.) 3
Giroux, R. v.....(Que.) 188
Girton v. Ontario and Minnesota Power Co.....(Ont.) 587
Gladue v. Walch.....(Man.) 69
Glass v. Glass.....(Ont.) 180

Gla-Gra.] COLUMN

Glazer, Popliger v. (Que.) 337
Glen Falls Ins. Co. v. Murcheson (Que.) 235
Glen Falls Ins. Co., Shepard & Merchants Bk. v. (Sask.) 316
Globe Securities, Flexlume Sign Co. v. (Ont.) 173
Gloucester, Tp. of, Eastview Public School Bd. v. (Ont.) 515
Goderich Mfg. Co. v. St. Paul Fire Ins. Co. (Ont.) 28
Godin v. City of Montreal (Que.) 420
Godin, Girard v. (Que.) 361
Godson, Burns & Co. v. (B.C.) 345
Godson, Greer v. (B.C.) 70
Gohier v. Morrisset (Que.) 139
Gohier, Norcross Bros. v. (Can.) 227
Gold, Royal Bank v. (B.C.) 64
Gold v. South Vancouver (B.C.) 32
Gold Seal Co. v. Attorney-General (Sask.) 129
Gold Seal Liquor Co., Abbott v. (B.C.) 181
Goldberg v. Lavut (Que.) 349
Goldston v. Alameda Farmers Elevator & Trading Co (Sask.) 440
Goltman v. Davidson (Que.) 301
Goodchild v. Wilcox (Ont.) 594
Goodman, McNairn v. (Ont.) 265
Goodwin v. Taylor (Ont.) 442
Goodwins Ltd. v. Brosseau (Que.) 466
Goose Lake Grain Co. v. Wilson (Sask.) 267, 442
Gordon v. Fraser (Ont.) 403
Gordon v. Gordon (Ont.) 211
Gorgnigiani v. Welch (B.C.) 33, 383
Gorman, Devall v. (Alta.) 264, 499
Gorochowsky v. Quebec Fire Ins. Co. (Que.) 167
Gosnell, Smith v. (Ont.) 177
Gottesman, Re (Ont.) 274
Gough v. Toronto and York Radial R. Co. (Ont.) 170
Gouin v. Rene (Que.) 210
Gouin v. Thompson (Que.) 482
Gouinlock v. Maclean (Ont.) 155
Goupil v. Van (Que.) 386, 470
Gourgue, Langlois v. (Que.) 165
Goyette v. Clermont (Que.) 301
Grace v. Kuebler (Alta.) 533
Grace v. Kuebler (Can.) 568
Grace, Perras v. (Que.) 143
Graham v. Canadian Freight Ass'n (Ry. Bd.) 84
Graham v. Crouchman (Ont.) 452, 580
Graham, Malloch v. (Que.) 212
Graham, Turnbull v. (Alta.) 437
Graham, Williams Machinery Co. v. (Can.) 42
Graham's Case, Re Land Titles Act (Sask.) 355
Graille, Ellis v. (Que.) 464
Grainger v. Order of Canadian Home Circles (Ont.) 237
Granby Consol. Mining & Smelting Co., Re (B.C.) 353
Grand'Mere, Town of, Surveyer v. (Que.) 154
Grand Mère, Village of, Roy v. (Que.) 448

Gra-Gra.] COLUMN

Grand Trunk and Canadian Pacific R. Cos., Dominion Millers Ass'n. v. (Ry. Bd.) 85
Grand Trunk and Canadian Pacific R. Cos., Town of Oakville v. (Ry. Bd.) 90
Grand Trunk, M.C., Wabash & N.Y.R. Cos., Essex Terminal R. Co. v. (Ry. Bd.) 87
G.T.P. Coast Steamship Co. v. Victoria-Vancouver Stevedoring Co. (Can.) 140
Grand Trunk Pacific R. Co. v. B.C. Express Co (Can.) 585
Grand Trunk Pacific R. Co. v. C.P.R. Co (Ry. Bd.) 81
Grand Trunk Pacific R. Co. v. City of Edmonton (Alta.) 541
Grand Trunk Pacific R. Co., Isitt v. (B.C.) 165, 486
Grand Trunk Pacific R. Co., McEntee v. (Sask.) 378
Grand Trunk Pacific R. Co., Stowe v. (Alta.) 233
Grand Trunk Pacific R. Co., Westholme Lumber Co. v. (B.C.) 196
Grand Trunk Pacific R. Co., Wimbles v. (Ry. Bd.) 487
Grand Trunk R. Co. and City of Montreal, McDonald v. (Que.) 377
Grand Trunk R. Co., Armstrong Cartage Co. v. (Ont.) 560
Grand Trunk R. Co., Austin v. (Ont.) 488
Grand Trunk R. Co., Brunelle v. (Ont.) 491
Grand Trunk R. Co. v. City of Hamilton (Ry. Bd.) 88, 489
Grand Trunk R. Co., City of Montreal v. (Ry. Bd.) 489
Grand Trunk R. Co., Dorion v. (Que.) 74
Grand Trunk R. Co. v. Mayne (Can.) 73
Grand Trunk R. Co., McGibbon v. (Que.) 337
Grand Trunk R. Co., Midland Lumber Shippers v. (Ry. Bd.) 88
Grand Trunk R. Co., Nathanson v. (Ont.) 76
Grand Trunk R. Co., O'Neil v. (Ont.) 379
Grand Trunk R. Co., Raine v. (Que.) 75
Grand Trunk R. Co., Smith v. (Que.) 388
Grand Trunk R. Co., Spearman v. (Que.) 174
Grand Trunk R. Co., Yukerviez v. (Que.) 390
Grand Valley R. Co., Trusts and Guarantee Co. v. (Ont.) 493
Grant v. Grant (Ont.) 590
Grant, Canada Wire and Cable Co. v. (Ont.) 467
Grant Smith & Co., Seattle Construction & Dry Dock Co. v. (B.C.) 344
Gratton v. City of Montreal (Que.) 423
Gratton Separate School v. Regina Public School (Sask.) 515
Gravel, Beaupre v. (Que.) 449
Graves, Duhamel v. (Que.) 512
Graves, The King v. (N.S.) 397
Gray, Re, Re Habeas Corpus (Can.) 124
Gray, Allen v. (Sask.) 10
Gray, Mann v. (Ont.) 569

Gre-Hal. COLUMN

Great North Western Telegraph and B.T. Cos., Chatham, City of, v. ....(Ry. Bd.) 550
Great North Western Telegraph Co., Town of Pas v. ....(Ry. Bd.) 550
Great Northern Ins. Co., Whitney v. ....(Can.) 312
Great Northern R. Co., Harris v. ....(Ry. Bd.) 487
Great West Permanent Loan Co. v. Hutchings ....(P.C.) 110
Great West Permanent Loan Co. v. McEvers ....(Sask.) 207
Great West Securities & Trust Co., Hart v. ....(Sask.) 183
Greater Winnipeg Water Dist., J. H. Tremblay Co. v. ....(Man.) 146
Green v. Henneghan ....(Alta.) 537
Green, R. v. ....(Alta.) 26, 558
Greenway, Hess v. ....(Ont.) 351
Greer v. Godson ....(B.C.) 70
Gregory v. Princeton Collieries; Re Execution Act ....(B.C.) 525
Greig and Thirlaway, Franco-Canadian Mtge. Co. v. ....(Can.) 472
Grenier, Advance Rumely Thresher Co. v. ....(Man.) 511
Griffin, Andrew v. ....(Alta.) 50
Griffin, The King v. ....(Ex.) 252
Gruninger, Lebrun v. ....(Que.) 161
Guardian Assurance Co. v. Garrett ....(B.C.) 102
Guardian Casualty Co., Collins v (B.C.) 308
Guelph, City of, Mahoney v. ....(Ont.) 424
Guelph, City of, Taylor v. ....(Ont.) 545
Guerin, Couture v. ....(Que.) 21
Guertin v. Brunet ....(Que.) 291
Guilbault, Robertson v. ....(Que.) 267, 455
Guilbeault v. Loomis ....(Que.) 46
Guillaume, Watson v. ....(Sask.) 10
Guillemette, Bourbeau v. ....(Que.) 352
Guindon v. Maclaren Co. ....(Que.) 293
Gulf Pulp & Paper Co. v. The King (Ex.) 149
Gurofsky, Fruchtenan v. ....(Ont.) 562
Guyler, Merchants Bank v. ....(Alta.) 543
Gwillim v. Carr & Staffen ....(Sask.) 171

Habeas Corpus, Re, Re Gray ....(Can.) 124
Habeas Corpus, Re, Re Lewis ....(Alta.) 124
Habeas Corpus, Re, Perlman v. Piché ....(Que.) 125
Hackam, R. v. ....(Ont.) 8
Hadwen, Tooley v. ....(Alta.) 522
Haeck v. Clermont and Chabot ....(Que.) 8
Hagersville Crushed Stone Co. v. M.C. R. Co ....(Ry. Bd.) 80
Hagman v. Merchants Bank ....(Alta.) 543
Haimson, Robin Hood Mills v. ....(Alta.) 238
Hainer, May v. ....(Ont.) 562
Haines, Judson v. ....(Ont.) 47
Hains v. Tooke ....(Que.) 460
Hainton, Hallam v. ....(Ont.) 507
Halifax Electric Tramway Co., The King v. ....(Ex.) 250
Halifax Lumber Co., Conrad v. (N.S.) 302, 444
Halifax & South Western R. Co., Wamboldt v. ....(N.S.) 378
Hall, Re ....(N.S.) 258

Hal-Har. COLUMN

Hall, Fidelity Trust Co. v. ....(Sask.) 580
Hall, The King v. ....(N.S.) 258
Hall Motors v. Rogers & Co. ....(Ont.) 509
Hallam v. Bainton ....(Ont.) 507
Hallett v. Bank of Montreal ....(N.B.) 235, 561
Halpern v. St. Cyr ....(Que.) 92
Halvorsen, Campbell v. ....(Sask.) 11
Halyczuk, Latha v. ....(Ont.) 67
Ham, R. v. ....(B.C.) 266
"Hamborn," The, In re ....(Ex.) 479, 497
Hamelin v. Newton ....(Man.) 180
Hamilton, City of, v. G.T.R. Co. ....(Ry. Bd.) 88
Hamilton, City of, G.T.R. Co. v. ....(Ry. Bd.) 489
Hamilton, City of, v. Hamilton Radial Elec. R. Co ....(Ry. Bd.) 488
Hamilton v. Colloway ....(Alta.) 162
Hamilton, G. & B. Electric R. Co., Orth v. ....(Ont.) 438
Hamilton, Montreal Tramways Co. v ....(Que.) 438
Hamilton Motor Works v. Browne (Ont.) 483
Hamilton Radial Electric R. Co., City of Hamilton v. ....(Ry. Bd.) 488
Hamilton Radial Elec. R. Co., City of Wentworth v. ....(Ont.) 334, 529
Hamilton Stove and Heater Co., Bank of Ottawa v. ....(Ont.) 104
Hamilton Street R. Co., Pasel v. ....(Ont.) 195
Hampton, Kastel v. ....(Que.) 215
Hancock, Re ....(Ont.) 596
Hand, Hawley v. ....(Ont.) 264
Haney v. C.N.R. Co. ....(Man.) 485
Hankin v. John Morrow Screw Co. ....(Que.) 194
Hanley, R. v. ....(Ont.) 331, 535
Hansen v. Franz ....(Can.) 575
Hanson, Banque d'Hochelaga v. ....(Que.) 61
Hanson, City of Lethbridge v. ....(Alta.) 94
Hare, De Luca v. ....(Ont.) 364
Harmston v. Woods, Re ....(Ont.) 18
Harrell, Bank of Toronto v (Can.) 264, 559
Harris, Re ....(Ont.) 244
Harris, R. v. ....(Ont.) 190
Harris v. Garson ....(Ont.) 332
Harris v. G.N.R. Co ....(Ry. Bd.) 487
Harris v. Peck Rolling Mills ....(Que.) 389
Harris, Scott v. ....(Alta.) 372
Harris, Sutherland v. ....(Ont.) 25
Harris & Co., Danforth Glebe Estates, Re ....(Ont.) 445
Harris Lithographing Co., Currie v. ....(Ont.) 524, 525
Harrison, Re ....(B.C.) 274
Harrison v. Harrison ....(Ont.) 213
Harrison, R. v. ....(B.C.) 34, 35, 259
Harrison, R. v. ....(Sask.) 187
Hart v. Great West Securities & Trust Co ....(Sask.) 183
Hart v. Rochon ....(Que.) 361
Hartery, Bank of Hamilton v. ....(B.C.) 355
Hartin v. C.N.R. Co. ....(Ry. Bd.) 89
Hartley, Macdonald v. ....(B.C.) 394
Hart-Parr Co. v. Wells ....(Can.) 508
Harty, East v. ....(Ont.) 288
Harty, Rat Portage Lumber Co. v. (Ont.) 267
Hartz, Kalnitsky v. ....(Que.) 61
Harvey v. Mutual Life Ass'nce ....(Que.) 17

Har-Hin.] COLUMN

Harvey & Taylor, R. v. (Ont.) 123
Harwich, Tp. of, Tompkins v. (Ont.) 280
Hassard v. Allen (Ont.) 265
Hastie, McGlynn v. (Ont.) 59
Hatfield, Gibbons v. (N.B.) 444
Hatton v. County of Peterborough (Ont.) 412
Hawley v. Hand (Ont.) 264
Hawthornthwaite, N. Cowichan v (B.C.) 546
Hay and Engledue, Re (Ont.) 398
Hay v. C.P.R. Co (Sask.) 74
Hayes v. Town of Montreal North (Que.) 468
Hays v. Weiland (Ont.) 205, 207
Heal, Re (Ont.) 606
Heald, Audette v. (Que.) 61
Hébert, Faucher v. (Que.) 280
Hébert, Germain v. (Que.) 217
Hébert, Lamothe v. (Que.) 200
Hébert, Payette v. (Que.) 165
Hébert, Sorel v. (Que.) 60
Hedley Shaw Milling Co. v. City of Medicine Hat (Alta.) 540
Hedrick, Piggott v. (Ont.) 64
Heffer v. Kokatt (Sask.) 180
Heffernan, Hudson Bay Co. v. (Sask.) 129
Heighington v. City of Toronto (Ont.) 547
Heinstein & Sons v. Polson Iron Works (Ont.) 151
Helleur, Spiegelberg v. (Que.) 510
Henderson, Re (B.C.) 240
Henderson, Burns v. (Alta.) 205
Henderson v. Strang (Ont.) 111
Henderson, Styles v. (Man.) 318
Henderson, Whyte v. (Ont.) 475
Henneforth v. Maloof (Ont.) 365
Henneghan, Green v. (Alta.) 537
Henry Hope & Sons v. Canada Foundry Co (Ont.) 151
Henry Morgan Co. v. City of Montreal (Que.) 90, 480, 494
Henry v. Seaton (Que.) 244
Henstridge v. London Street R. Co. (Ont.) 172
Hepworth, Clark v. (Can.) 474
Herald Publishing Co., Scown v. (Can.) 362
Herdman v. Maritime Coal, Railway and Power Co. (N.S.) 431
Herman and Lawson v. Blain (Sask.) 572
Heroux v. Laurentides Brique Co. (Que.) 143
Hess v. Greenway (Ont.) 351
Hessenauer, Thede v. (Ont.) 528
Hetherington, St. George Mansions v. (Ont.) 346
Hetting v. Sneeth (Ont.) 473
Hettler Lumber Co., Unger v. (Ont.) 148
Hetu v. Coutlee (Que.) 23, 211
Hetu v. Morinville Oil City Land Co. (Alta.) 580
Hewitt and Armstrong, Re (Ont.) 574
Hewitt and Hewitt, Re (Ont.) 311
Hickman v. Warman (Ont.) 575
Hilkevics, Toth v. (Sask.) 503
Hill v. Lambton Golf and Country Club (Ont.) 3
Hill, Lavie v. (N.S.) 328
Hill v. Toronto R. Co (Ont.) 533
Hilton v. Robin Hood Mills (Sask.) 433
Hinds, Cook v. (Ont.) 103
Hingston, Bénard v. (Can.) 351

Hin-Hud.] COLUMN

Hingston, School Commr's d'Hochelaga v. (Que.) 66
Hiram Walker and Town of Walkerville, Re (Ont.) 539
Hisey, Wheeler v. (Ont.) 474
Hoag v. Kloepfer (B.C.) 580
Hobbs and Kenabeek Consolidated Silver Mines, Re (Ont.) 117
Hochelaga School Comm'rs v. Kingston (Que.) 66
"Hocking," The, Re (Ex.) 479
Hodgkins, Re (Ont.) 603
Hoe Co., R. v. Foote (Que.) 500
Hoehn v. Marshall (Ont.) 410
Hoffman, R. v. (Man.) 92, 322
Hogan v. Northern Construction Co. (Alta.) 341
Hogle v. Township of Ernesttown (Ont.) 525
Hogue, R. v. (Ont.) 202, 558
Holder, Townsend v. (Que.) 59
Holitski, Pollock v. (Sask.) 285
Holland Canada Mtge Co., Re Land Titles Act (Sask.) 356
Holland, v. Town of Walkerville (Ont.) 424
Holliday v. Bank of Hamilton (Ont.) 267
Holliday, Marshall v. (Ont.) 527
Hollinger Consolidated Gold Mines, Kristo v (Ont.) 9
Holmes, Re (Sask.) 56
Holmes v. Husband (Ont.) 402
Homan and City of Toronto, Re (Ont.) 413
Home Insurance Co., Kibzcy v. (Man) 313
Home Loan & Mtge. Co. v. Fishman (Que.) 168
Homesteads Act, Re; Re Land Titles Act (Sask.) 286
Honsburger, Weyburn Townsite v. (Ont.) 102
Hook v. City of Prince Albert (Sask.) 381
Hopwood v. The King (Ex.) 191
Horne Co. v. Canadian Freight Ass'n (Ry. Bd.) 83
Horton v. Deeb (Que.) 511
Hossack v. Shaw (Can.) 319
Houde, Cailloux v. (Que.) 449
Houde, Daoust v. (Que.) 38
Houde v. Mainville (Que.) 608
Houde, Poulin v. (Que.) 462
Houghton, Bifrost v. (Man.) 524
Houle, Kamouraska Telephone Co. v. (Que.) 163
Howard v. B.C. Elec. R. Co (B.C.) 444
Howard, Duggan v. (Que.) 175
Howard v. Findlay (Que.) 456
Howick Farmers Mutual Fire Ins. Co., Gabel v (Ont.) 307
Howie v. Howie (Ont.) 456
Hoyes v. Fraternal Order of Eagles (B.C.) 267
Hudon v. Connolly (Que.) 572
Hudon, Johnson v. (Que.) 288
Hudson Bay Co. v. Dion (Que.) 527
Hudson Bay Co. v. Heffernan (Sask.) 129
Hudson Bay Insurance Co. v. Creelman (B.C.) 106
Hudson Bay Insurance Co., Yamashita v (B.C.) 207
Hudson's Bay Co., The King v. (Ex.) 254
Hudson's Bay Co., Rur. Mun. of Bratts Lake v (Sask.) 182, 539, 541

Huf-Ier.		COLUMN
Huff v. Burton	(Ont.	357
Hughes, Re	(Ont.	564
Hughes, Gerow v.	(Ont.	156
Hughes, Sierichs v	(Ont.	156
Huron and Lake Erie Mortgage Corp. Re	(Ont.	466
Husband, Holmes v	(Ont.	401
Hutchings, Canada National Fire Ins. Co. v.	P.C.	110
Hutchings, Great West Permanent Loan Co. v	P.C.	111
Hutchings, McKay v.	(Ont.	306
Hutchinson v. City of Toronto	(Ont.	20
Hutchinson v. Shearer	(N.S.	46
Hyatt, Walmsley v	(Ont.	472
Hyde, Vincent v.	(Que.	175
Hyder, R. v.	(Sask.	27
Hydro-Electric Power Com. and Power Estate, Re	(Ont.	250
Ibbotson v. Berkley	B.C.	372
Ibbotson, "L'Autorite" v	(Can.	13
Ideal Foundry and Hardware Co. Re	(Ont.	115
Illsley, R. v	(N.S.	240, 253
Imperial Bank v. Boyd	(Ont.	270
Imperial Bank v. Western Supply & Equipment Co.	(Alta.	36
Imperial Elevator & Lumber Co. v. Village of Ponteix	Sask.	413
Imperial Oil Co., Caron v.	(Que.	386
Imperial Oil Co., Carr v.	(Sask.)	383
Imperial Steel & Iron Co., Rowntree v.	(Ont.)	135
Increase in Passenger and Freight Tolls, Re	(Ry. Bd.)	80
Indian Reserve, Re, Re City of Sydney	(Ex.)	295
Ingeniera Importadora Y. Contratista, San Martin Mining Co. v	(Que.)	63, 168, 335, 470
Ingersoll Packing Co. v. N.Y.C. & H.R. R. Co. and Cunard Steamship Co.	(Ont.)	29, 617
Ingle v. Routhier	(Que.)	477
Ingram, Re	(Ont.)	602
Inman v. Western Club	(B.C.)	408
International Bridge & Terminal Co. v. C.N.R. Co.	(Ry. Bd.)	488
International Bridge and Terminal Co. Walsh v.	(Ont.)	437
International Construction Co., Prudential Trust Co. v.	(Que.)	237
International Harvester Co., Calder v.	(Sask.)	405, 561
International Harvester Co. v. Zarbok	(Sask.)	122
International Hotel Windsor, Straus Land Corp. v.	(Ont.)	347
International Securities Co., Dannecker v	(Ont.)	579
International Securities Co., Yost v.	(Ont.)	579
Investors, Re (Ball's Case)	(Man.)	110
Irons, Silks Limited v	(Ont.)	457
"Iroquois," The, Pallen v	(Ex.)	100
Isitt v. G.T.P. R. Co	(B.C.)	165, 486
Israelowitz, State of New York v	(B.C.)	185, 250, 257, 259

Iva-Jam.		COLUMN
Ivanchuk, R. v	Alta.)	275
J.I. Case Threshing Machine Co. v. Moen	Sask.)	505
J.I. Case Threshing Machine Co. v. Wenn	Sask.)	504
Jackson v. B.C. Elec. R. Co.	B.C.)	560
Jackson, Chamagne v	Que.)	470
Jackson, Lewis v	Alta.)	512
Jackson v. McKay	Ont.)	163
Jackson, R. v	(Ont. 95, 224,	566
Jackson, Saskatoon v	Sask.)	511
Jackson, Sutherland v	Ont.)	65
James, R. v	Que.	16
James v. Stanfield	Que.)	60
James, Wagman v	Que.)	518
James, Western v	Ont.)	147
James, Davis v	(Que.)	63
James & Que. Harbour Commrs., The King v	(Ex.)	253
James, Johnson v	Sask.)	188, 190
James, The King v.	N.S.)	526
James v. Smyth	Man.)	405
James, Wade v	Ont.)	40
Jarrett & Fredrick, Saskatoon v	Sask.)	455
Jarvis v. Connell	(Ont.)	69
Jarvis, Geer v	Alta.)	287
Jasmin v. Jasmin	Que.)	455
Jaynes v. Jaynes	Ont.)	216
Jean, Banque Nationale v.	(Que.)	528
Jean, Marchand v	(Que.)	377
Jeffries v. City of Toronto	(Ont.)	424
Jesske, Zaiser v	(Sask.)	499
Johansen v. Windsor Hotel Co.	(Que.)	378
Johansson v. Cronquist	(Alta.)	353
John Hing Co. v. Sit Way	(B.C.)	22, 457
John Morrow Screw Co., Hankin v.	(Que.)	194
John Palmer Co. v. Palmer-McLellan Shoepack Co.	(N.B.)	173
Johns, Re, Caledonia Mill, Co v.	(Ont.)	296
Johnson, Burns v	(B.C.)	483
Johnson & Carey Co. v. C.N.R. Co.	(Ont.)	392
Johnson v. The "Charles S. Neff"	(Ex.)	6
Johnson v. Hudon	(Que.)	288
Johnson v. James	(Sask.)	188, 190
Johnson, Mitchell v.	(Man.)	222
Johnson v. Regent Construction Co.	(Que.)	70, 478
Johnston, Anderson v.	(Sask.)	371
Johnston, Bell v	(B.C.)	47, 401
Johnston, Royal Bank v.	(Ont.)	54
Joliette Telephone Co. v. Bell Telephone Co.	(Ry. Bd.)	551
Joliette, Village of, v. Pellant	(Que.)	141
Joncas, La Banque Nationale v.	(Que.)	64
Jones, Re	(Ont.)	600
Jones Bros. & Co., Creed v.	(Sask.)	2
Jones, Dolson v	(Ont.)	265
Jones, Limoges v	(Que.)	201
Jones & Lyttle v. Mackie	(Can.)	23, 146
Jourdain v. Canada Box Board Co	(Que.)	390
Jubinville v. Lafond	(Que.)	510
Judson v. Haines	(Ont.)	47
Julien v. Chevanelle	(Que.)	449
Julien v. Lamy		339
Julien v. Marchand	(Que.)	583
Juneau v. Bergeron	(Que.)	302
Juneau v. Took	(Que.)	477

Kad-Kin.] COLUMN

Kadlac, Liverpool & London Ins. Co. v ....(Alta.) 320
Kalnitsky v. Hartz....(Que.) 61
Kamouraska, Goaler of, Morin v. (Que.) 276, 277
Kamouraska Telephone Co. v. Houle ....(Que.) 163
Kander, Legault v....(Que.) 48
Karch v. Edgar....(Ont.) 213
Karp, R. v....(Ont.) 185, 553
Kastel v. Hampton....(Que.) 215
Kastner, Gerand v....(Que.) 268
Kaswan v. Solin....(Que.) 51, 468
Kaufman v. Rur. Mun. of Baildon ....(Sask.) 542
Kautsoginapoulos, Vousounara v (Que.) 362
Kay v. Ratz....(Alta.) 299, 497
Keefer, Macdonell v....(Ont.) 408
Keegan v. The King....(Ex.) 191
Keel, Bijou Motor Parlors v....(Alta.) 45
Keeler, Williams v....(Man.) 378
Keirstead, The King v....(N.B.) 187, 189
Keith v. Brown....(Ont.) 156
Keith, Maxwell v....(Que.) 359
Keith, Secord v....(Alta.) 114
Kelley, Barron v....(B.C.) 238
Kelly, Barron v....(Can.) 578
Kelly, Cunningham v....(Ont.) 403
Kelly and Selby, Boehmer v....(Ont.) 563
Kelowna, Corp. of, C.N.P.R. Co. v ....(B.C.) 541
Kemish, Seagram v....(Ont.) 512
Kendrew, Re....(Ont.) 603
Kennedy, The City of New Westminister v....(B.C.) 547
Kent, Pilkington v....(B.C.) 401
Keon v. McNally....(Que.) 245
Kerr, LeGroulx v....(Que.) 432
Kettle Valley R. Co., Gavin v (B.C.) 439, 442
"Keywest," The, Canadian Sand and Gravel Co. v....(Ex.) 99
Kibzey v. The Home Ins. Co....(Man.) 313
Kidd v. Millar....(Alta.) 522
Kiely, Smith & Amos, McMahon v ....(Ont.) 158
Kildonan Investments v. Thompson ....(Can.) 13
Kill-Em-Quick Co., Mickelson v (Man.) 555
Killorin, Re....(Ont.) 596
Kimbrough, R. v....(Alta.) 553
King, v. Sehon....(Alta.) 476
King, The, Archibald v....(Can.) 262
King, The, v. Bannatyne and Vokes (Ex.) 253
King, The, Beaulieu v....(Ex.) 157
King, The, Belanger v....(Ex.) 247
King, The, v. Benjamin....(Que.) 188
King, The, v. Bertrand....(N.S.) 266
King, The, v. Berry....(Ex.) 255
King, The, v. Blais and Vadeboncoeur ....(Ex.) 253
King, The, v. Bonhomme....(Ex.) 482
King, The, Bonin v....(Ex.) 199
King, The, Bonneau v....(Ex.) 448
King, The, v. Bowles....(Ex.) 249
King, The, Boyer v....(Ex.) 435
King, The, v. Bradburn....(Ex.) 254
King, The, v. Brenton....(Ex.) 248
King, The, Brousseau v....(Can.) 185

Kin-Kin.] COLUMN

King The, Brunet v....(Can.) 179, 234
King, The, Buck v....(Can.) 257
King, The, v. Cady....(N.B.) 321
King, The, Canada & Gulf Terminal R. Co. v....(Can.) 16
King, The, Cantin v....(Ex.) 192
King, The, v. Carrieres De Beauport ....(Ex.) 252
King, The, v. Cote....(Ex.) 252
King, The, Courteau v....(Ex.) 192
King, The, v. Davis and Findlay....(Ex.) 253
King, The, Dionne v....(Ex.) 192
King, The, v. Doherty....(N.B.) 325
King, The, v. Duncan....(Ex.) 252
King, The, Dunnett v....(Ex.) 438
King, The Dussault and Pageau v. (Ex.) 145
King, The, v. Farlinger....(Ex.) 250
King, The, v. Flaherty and Malepart ....(Que.) 277
King, The, Fleet v....(Can.) 16
King, The, Fontaine v....(Ex.) 487
King, The, Fradette v....(Ex.) 367
King, The, v. Fraser....(Sask.) 184
King, The, Fugere v....(Ex.) 251
King, The, Gagnon v....(Ex.) 383
King, The, Gauthier v....(Can.) 31
King, The, v. Gibb....(P.C.) 250
King, The, Gilbert, Bros. Engineering Co. v....(Ex.) 71
King, The, Giroux v....(Can) 187
King, The, v. Graves....(N.S.) 397
King, The, v. Griffin....(Ex.) 252
King, The, Gulf Pulp & Paper Co. v. ....(Ex.) 149
King, The, v. Halifax Electric Tramway Co....(Ex.) 250
King, The, v. Hall....(N.S.) 258
King, The, v. Hudson's Bay Co....(Ex.) 254
King, The, Hopwood v....(Ex.) 191
King, The, v. Jalbert and Quebec Harbour Comm'rs....(Ex.) 253
King, The, v. James....(N.S.) 526
King, The, v. Joseph Allison....(Ex.) 249
King, The, Keegan v....(Ex.) 191
King, The, v. Keirstead....(N.B.) 187, 189
King, The, v. Larivée....(Can.) 251
King, The, Le Blanc v....(Ex.) 197
King, The, v. Lee....(Ex.) 247
King, The, Lefebvre v....(Ex.) 141
King, The v. Legault....(Que.) 164
King, The, v. Limerick....(N.B.) 93
King, The, Lemieux v....(Ex.) 217
King, The, v. Lorette....(Man.) 413
King, The, Lowe v....(Ex.) 321
King, The, Malone v....(Ex.) 554
King, The, v. Mason....(Que.) 220
King, The, Maxwell v....(Ex.) 249, 278
King, The, v. Montgomery-Campbell and Northfield Coal Co....(Ex.) 254
King, The, Murphy and Gould v. (Can.) 398
King, The, v. Neilson....(N.S.) 553
King, The, v. Newcombe....(N.S.) 531
King, The, Noel v....(Ex.) 585
King, The, v. O'Brien....(N.B.) 91
King, The, v. O'Brien....(Que.) 208
King, The, v. Patrick King....(Ex.) 197
King, The, v. Petrie Mfg. Co....(Ex.) 249
King, The, v. Picard....(Ex.) 251
King, The, Poisson v....(Ex.) 481
King, The, Power v....(Can.) 254

Let-Lyn.] COLUMN

Letourneau, Town of Montmagny v. ....(Can.) 33
Lett v. Gettins....(Sask.) 355
Levenick, Queen's Park Corp. v (Sask.) 575
Levis, City of, Lessard v....(Que.) 377
Levy, Orban v....(Que.) 148
Lewis, Re, Re Habeas Corpus..(Alta.) 124
Lewis, Alberta N.W. Lumber Co. v. ....(B.C.) 578
Lewis v. Chatham Gas Co....(Ont.) 301
Lewis Miller & Co. v. Clow....(N.S.) 234
Libercent, Sabbath v....(Que.) 352
Limerick, The King v....(N.B.) 93
Lim Jim v. McRae....(B.C.) 328
Limoges v. Jones....(Que.) 201
Limoges, Pacaud v....(Que.) 395
Lincoln, County of, Village of Merriton v....(Ont.) 280
Lindley v. Vassar....(B.C.) 403
Lipson, Foley v....(Ont.) 574
Little v. Reaycraft....(Que.) 294
Liverpool & London Ins. Co. v. Kadlac ....(Alta.) 320
Liverpool, Manitoba Ass'nce Co., Staddon v....(Ont.) 307
Livingston, Wannamaker v....(Ont.) 593
Lloyd, Beaubier v....(Alta.) 270
Local Board of Health of Belleville, Simpson v....(Ont.) 173
Local Union of Mine Workers, Williams v....(Alta.) 123
Loew's Hamilton Theatres, Business Realty v....(Ont.) 218
Loiselle, Banque Nationale v....(Que.) 309
London, City of, O'Dell v....(Ont.) 463
London Free Press Printing Co., Wilson v....(Ont.) 362
London and Lancashire Fire Ins. v. Veltre....(Can.) 552
London Life Insurance Co., Robinson v. ....(Ont.) 314
London Street R. Co. Henstridge v. ....(Ont.) 172
London and Western Canada Investment Co. v. Dolph....(Ont.) 579
Loney, Whitlock v....(Sask.) 393, 394
Longpre v. Dumoulin....(Que.) 27, 419
Longshoremen's Union, Poliquin v (Que.) 106
Loomis, Guilbeault v....(Que.) 46
Loranger v. Aubry....(Que.) 220
Loranger, St. Catherine St. Realty Co. v. ....(Que.) 238
Lord v. Village of St. Jean....(Que.) 66
Lorette, The King v....(Man.) 413
Lorimer, Stackhouse v....(Que.) 463, 464
Lovett, West Canadian Coal Mining v....(Que.) 51
Lowe, Gauthier v....(Que.) 467
Lowe, v. The King....(Ex.) 321
Lower Argyle Station, Re....(Ry. Bd.) 88
Lumbers, Forbes v....(Ont.) 475
L'Union Mutuelle Des Voyageurs de Commerce, Bélanger v....(Que.) 305
L'Union St. Joseph de Lachine, Piche v. ....(Que.) 315
Lynch v. Jackson....(Alta.) 512
Lynch-Staunton, R. v....(Ont.) 323
Lynch-Staunton v. Somerville....(Ont.) 172

Mac-Man.] COLUMN

Mac & Mac Cedar Co., Morse v. ....(B.C.) 160, 230
Macdonald, Clegg v. ....(Man.) 373
Macdonald v. Hartley ....(B.C.) 394
Macdonell v. Keefer ....(Ont.) 408
Machray, Chalmers v. ....(Can.) 70
Mackay v. City of Toronto ....(Ont.) 429
Mackay, City of Victoria v. ....(Can.) 527
MacKay, Markle, v. ....(Ont.) 577
Mackay, R. v. ....(Alta.) 561
Mackey, Re ....(N.S.) 277
Mackey, R. v. (N.S.) 275, 277, 286, 296
Mackenzie, Smith v. ....(Ex) 99
Mackie, Jones & Lyttle v. ....(Can.) 23, 146
Maclaren Co., Guindon v. ....(Que.) 293
Maclean, R. v. ....(Alta.) 323
Maclean, Gouinlock v. ....(Ont.) 155
Macleod Flouring Mills, Farm Products v. ....(Alta.) 224
Macleod, Town of, v. Campbell....(Can.) 545
MacSwiney, Re; Re Roche ....(Ont.) 397
Magill v. Tp. of Moore ....(Ont.) 283
Mah Kong Doon v. Mah Cap Doon ....(Alta.) 456
Mahan v. Manness ....(Man.) 471
Maher v. Archambault ....(Can.) 454
Maher, Gingras v....(Que.) 268, 499
Mahoney v. City of Guelph ....(Ont.) 424
Maillet v. Dubeau ....(Que.) 484
Mailett v. Quebec College of Dental Surgeons ....(Que.) 480
Mailloux, Re, ...(Ont.) 602
Mailloux, Angrignon v. ....(Que.) 468
Mailoux Desautels v. ....(Que.) 211
Mainville Houde, v. ....(Que.) 608
Maisonneuve, City of, v. C.N.R. Co. ....(Ry. Bd.) 489
Maisonneuve, Ville de, Elder Ebano Co. v. ....(Que.) 149, 150
Maisonneuve, Court Recorder of the City of, Lajeunesse v. ....(Que.) 92
Major v. Scarborough ....(Que.) 37
Makepeace, Union Bank v. ..(Ont.) 265, 272
Malcolm and Olson, R. v. ....(Alta.) 120
Malden Public School Board v. Sellers ....(Ont.) 557
Maldover v. Norwich Union Fire Insurance Co. ....(Ont.) 304
Malepart, Flaherty v. ....(Que.) 277
Malepart, Miller v. ....(Que.) 186, 274
Malepart, Myers v. ....(Que.) 275
Malherbe v. Orkin ....(Que.) 377
Malloch v. Graham ....(Que.) 212
Malo, Dupuis v. ....(Que.) 211
Malone v. The King ....(Ex.) 554
Maloof v. Bickell ....(Ont.) 150
Maloof, Henneforth v. ....(Ont.) 365
Manchuck v. Rubber Regenerating Co. ....(Que.) 386, 391
Manie v. Town of Ford ....(Ont.) 424
Manitoba, Province of, v. C.P.R. Co. ....(Ry. Bd.) 551
Mann v. Gray ....(Ont.) 569
Manness, Mahan v. ....(Man.) 471
Mansfield, Beatty v. ....(Que.) 264
Mansfield and Pontefract, Tps. of, Denault v. ....(Que.) 284, 374

Map-Mat.[	COLUMN
Maple Leaf Lumber Co. v. Caldbick and Pierce (Ont.)	166, 360
Marceau v. Tassé (Que.)	292
Marchand v. Jean (Que.)	377
Marchand, Julien & Co. v. (Que.)	583
Marcil v. Bureau (Que.)	140
Marcil, Teney v. (Que.)	168
Marconi Wireless Telegraph Co. v. Canadian Car & Foundry Co. (Que.)	299
Marcotte v. Auto Garage (Que.)	49
Marcotte, St. Maurice Paper Co. v. (Que.)	390
Marcotte v. School of Portneuf (Que.)	515
Marcus, Ramey v. (N.S.)	61
Maritime Coal, Railway & Power Co. v. Clark (N.B.)	503, 506
Maritime Coal, Railway & Power Co., Herdman v. (N.S.)	431
Maritime Motor Car Co., B.C. Independent Undertakers v. (B.C.)	19
Markle v. MacKay (Ont.)	577
Marks v. Cohen (Que.)	9
Marleau v. Cedars Rapids Mfg. & Power Co. (Que.)	255
Marquis v. Montreal Fireman's Benefit Ass'n. (Que.)	316
Marsden Estate, McCullough v. (Alta.)	565
Marsden, Dunham v. (N.B.)	443, 470
Marsden v. Minnekahda Land Co. (B.C.)	120
Marshall Hoehn v. (Ont.)	410
Marshall v. Holliday (Ont.)	527
Marshall, Nutt v. (Que.)	147
Marsil v. McDonald (Que.)	460
Martel, Laferte v. (Que.)	135, 581
Martel v. Page (Que.)	214
Martin, Bank of Commerce v. (B.C.)	118
Martin, Canadian Bank of Commerce v. (B.C.)	118
Martin, Carson v. (Ont.)	519
Martin, Giroux v. (Que.)	231, 269
Martin, Mercier v. (Que.)	447
Martin v. New Carlton Hotel (Que.)	331
Martin, R. v. (Ont.)	295
Martin, Robert v. (Que.)	203
Martin, Rur. Mun. of Snipe Lake v. (Sask.)	539
Martin, Village of Beaconsfield v. (Que.)	4
Mason v. Florence (Ont.)	407
Mason, The King v. (Que.)	220
Mason & Risch v. Christner (Ont.)	509
Massicote v. Bourassa (Que.)	496
Massinghill v. Att'y Gen'l of Canada (Ex.)	482
Masson v. Bastien (Que.)	240
Master Builders' Co., Farmers' Advocate v. (Man.)	144
Matamajaw Salmon Club, Duchaine v. (Que.)	220
Mather & Noble v. Diamond Vale Supply Co. (B.C.)	168
Matheson, National Trust Co. v. (Ont.)	245
Mathews Steamship Co. v. McCarthy (Que.)	167
Mathews Steamship Co., McCarthy v. (Que.)	383

Mat-McF.]	COLUMN
Mathieu, Blais v. (Que.)	65
Mathieu, Lachance v. (Que.)	218
Mathys v. Factories Ins. Co. (Que.)	342
Matte, Parent v. (Que.)	14, 17
Matte, Village of Ste. Thècle v. (Que.)	369
Maurice, Colonial Toy and Show Case and Richards & Organ v. (Que.)	119
Maurizio v. Montreal Tramways Co. (Que.)	3
Maxwell v. Keith (Que.)	359
Maxwell v. The King (Ex.)	249, 278
May v. Hainer (Ont.)	562
May v. Wheaton (Ont.)	452
Mayberry, Coe v. (Sask.)	48
Mayfair Investments v. Somers (Ont.)	557
Mayhew, Buckley Drouin Co. v. (Que.)	464
Mayne, G.T.R. Co. v. (Can.)	73
McAfee v. Town of Deseronto (Ont.)	285
McAllister and Toronto and Suburban R. Co., Re (Ont.)	253
McAuley, R. v. (Man.)	288
McAvoy v. City of Montreal (Que.)	367
McCain Produce Co., Scott & Co. v. (N.B.)	26
McCall v. Patenaude (Que.)	340
McCallum, Re (Ont.)	596
McCallum v. Cohoe (Ont.)	288, 289
McCallum & Vannatter, Schell v. (Can.)	273
McCarthy, City of Regina v. (P.C.)	515
McCarthy v. Mathews Steamship Co. (Que.)	383
McCarthy, Mathews Steamship v. (Que.)	167
McCarthy, R. v. (Ont.)	185
McCartney v. McCartney (Ont.)	464
McCauley, Duggan v. (Ont.)	472
McConkey Arbitration, Re (Ont.)	349
McCord v. Alberta & Great Waterways R. Co. (Can.)	22, 368, 586
McCoy, Jackson v. (Ont.)	163
McCoy, National Benefit Life Ass'ce Co. v. (Can.)	120
McCranor, R. v. (Ont.)	327
McCulloch, Fairweather v. (Ont.)	133
McCullough v. Marsden Estate (Alta.)	565
McCurdy v. Oak Tire Co. (Ont.)	204
McDonald Co. v. Cushing (B.C.)	519
McDonald v. G.T.R. Co. and City of Montreal (Que.)	377
McDonald, Marsil v. (Que.)	460
McDonald, New Ontario Timber Co. v. (Ont.)	151
McDonald v. Peuchen (Ont.)	295, 332
McDonald v. School Dist. of Earl Grey (Man.)	515
McDonnell, Belanger v. (Que.)	456
McDonnell, Montreal Tramways Co. v. (Que.)	530
McDougall v. Riordan (B.C.)	69
McDuff, Themens v. (Que.)	576
McEntee v. G.T.P.R. Co. (Sask.)	378
McEvers, Great West Permanent Loan Co. v. (Sask.)	207
McEwan, R. v. (Ont.)	322
McFadden v. McFadden (Ont.)	213
McFarlane, Ex parte (N.B.)	321

McF-McM.] COLUMN

McFarlane, Erickson v. ....(Ont.) 167
McFarlane v. Price ....(Ont.) 410
McFee v. Montreal Transportation Co. ....(Que.) 75, 315
McFeeley v. B.C. Elec. R. Co. ....(B.C.) 173
McGee v. Rosetown Elec. Light & Power Co. ....(Sask.) 194
McGibbon, Re ....(Alta.) 273
McGibbon v. G.T.R. Co. ....(Que.) 337
McGlynn v. Hastie ....(Ont.) 59
McHugh v. McGuire ....(N.B.) 606
McIlmurray v. Toronto & York Radial R. Co. ....(Ont.) 195
McIlwee v. Foley ....(B.C.) 23, 195
McIntosh, Eastern Canada Fisheries v. .... (Que.) 119
McIntosh, Sumner v. ....(Sask.) 521
McIntyre v. Alberta Pacific Grain Co. ....(Alta.) 498
McIntyre & Co. v. Law ....(Alta.) 195
McIsaac, Canada Hail Ins. Co. v. .... (Sask.) 305
McKay and City of Vancouver, Re .... (B.C.) 373
McKay, Broderick v. ....(Ont.) 55
McKay, Douglas v. ....(N.S.) 351
McKay v. Hutchings ....(Ont.) 368
McKay v. McKay ....(N.S.) 335
McKay v. Tudhope Anderson Co. .... (Alta.) 474
McKee v. Philip ....(Can.) 473
McKeen, Gillespie v. ....(Sask.) 160
McKeen v. Molsons Bank ....(Que.) 456
McKernan, Cristall v. ....(Alta.) 557
McKibbon v. Wellbanks ....(Ont.) 564
McKillop v. Royal Bank ....(Can.) 55
McKinlay v. Mutual Life Ass'ce Co. .... (B.C.) 350
McKinnon Chain Co., Dominion Chain Co. v. ....(Ex.) 457
McKinnon Dash Co., Consolidated Plate Glass Co. v. ....(Ont.) 198
McKinnon, Tainter v. ....(Alta.) 194, 524
McLagan Furniture Co., Meade v. .... (Ont.) 475
McLean, Re ....(Ont.) 596
McLean, Re, Ex parte Parish of Rothesay ....(N.B.) 550
McLean, Clarkson v. ....(Ont.) 243
McLean v. Y.M.C.A. ....(Alta.) 436
McLellan, Esquimalt & Nanaimo R. Co. v. ....(B.C.) 483
McLeod v. McLeod ....(B.C.) 333
McLeod v. McRae ....(Ont.) 7
McLennan, Royal Bank v. ....(B.C.) 526
McMahon v. Kiely Smith & Amos .... (Ont.) 158
McManus, Brankley, Rex ex rel. v. .... (Alta.) 330
McManus, Colonial Investment v. .... (Sask.) 411
McManus, Cossey v. ....(N.S.) 63
McManus, R. v. ....(Alta.) 535
McMartin, Wood v. ....(Que.) 460
McMillan v. Cameron ....(B.C.) 135
McMillan, Murphy v. ....(N.B) 3, 7
McMillan v. Pink ....(Ont.) 523
McMullin v. Spark ....(Que.) 338

McN-Mes.] COLUMN

McNairn v. Goodman ....(Ont.) 265
McNally, Keon v. ....(Que.) 245
McNamara, Franco Belgium Investment Co. v. ....(Alta.) 206
McNaught and Stokes-Stephen Oil Co., Re .... (Alta.) 32, 34
McNaught, Stokes-Stephens Oil Co. v. .... (Can.) 30, 34
McNeil, Re ....(N.B.) 595
McNeil, Metro Pictures Ltd. v. .... (Que.) 116, 171
McNeil, Nichols v. ....(Can.) 291
McPherson, Burford Coal Co. v. .... (Ont.) 151
McPherson v. City of Toronto..(Ont.) 376
McPherson v. Niagara Grain and Feed Co. ....(Ont.) 507
McRae, Lim Jim v. ....(B.C.) 328
McRae, McLeod v. ....(Ont.) 7
McTavish v. Corbet Foundry...(Ont.) 151
Meade v. McLagan Furniture Co..... .... (Ont.) 475
Meadowcreek Lumber Co. v. Adolph Lumber Co. ....(B.C.) 511
Meadowcreek Lumber Co., Adolph Lumber Co. v. ....(B.C.) 20
Meagher v. Walsh ....(Que.) 520
Mechanics Lien Act, Re; Re Land Titles Act ....(Sask.) 396
Medicine Hat, City of, Hedley Shaw Milling Co. v. ....(Alta.) 540
Meeker v. Nicola Valley Lumber Co. .... (Can.) 568
Meilleur, Vezina v. ....(Que.) 60
Membery v. Smith ....(Ont.) 280
Menard v. City of Montreal....(Que.) 416
Mendelsohn, Parent v. ....(Ont.) 473
Menzies v. Bartlet ....(Ont.) 136
Mercantile Fire Ins. Co., Rogers v... .... (Ont.) 308
Mercantile Trust Co. v. Campbell..... .... (Ont.) 133
Mercantile Trust Co., Fulton v...(Ont.) 169
Merchants Assn'ce Co., Parent v. .... (Que.) 317
Merchants Bank v. Bush ....(Can.) 53
Merchants Bank v. Eliot ..(Eng.) 122, 399
Merchants Bank v. Guyler ....(Alta.) 543
Merchants Bank, Hagman v. ....(Alta.) 543
Merchants Bank, Smith v. ....(Ont.) 335
Merchants Bank, Stevens v. ...(Man.) 52
Merchants Bank v. Thomson ...(Alta.) 562
Merchants Bank v. Winnipeg Fur Co. .... (Man.) 55
Merchants Casualty Co., Robb v..... .... (Man.) 306
Mercier v. Martin ....(Que.) 447
Mercier v. Montreal Tramways Co. .... (Que.) 342
Mercier, Vidal v. ....(Que.) 588
Mercure v. Munsey ....(Que.) 468
Merker, Gardiner v. ....(Ont.) 506
Merrick, Prentice v. ....(B.C.) 475
Merriton, Village of, v. County of Lincoln ....(Ont.) 280
Merry v. Montreal Tramways Co..... .... (Que.) 559
Messenger v. Miller ....(N.S.) 197

Met-Mon.] COLUMN

Metal Products Co., Bemier Glass Co. v. ..... (Que.) 114
Metro Pictures Ltd. v. McNeil ..... (Que.) 116, 171
Meyers, Stock v. ..... (Ont.) 497
Michaelson & Sons v. Babb .... (Ont.) 508
Michaud v. Destrempes ..... (Que.) 294
Michaud, Krauss v. ..... (Que.) 39
Michaud and Larson, Re ..... (Ont.) 239
Michelakis v. Regimbald ..... (Que.) 337
Michigan Central R. Co., Hagersville Crushed Stone Co. v. ... (Ry. Bd.) 80
Michigan Trust Co. v. Canadian Puget Sound Lumber Co. ..... (B.C.) 116, 182, 405
Mickelson v. Kill-Em-Quick Co.. (Man.) 555
Midland Lumber Shippers v. G.T.R. Co. ..... (Ry. Bd.) 88
Mignault v. Desjardins ..... (Can.) 473
Mika, Estate Re ..... (Sask.) 596
Millar Estate, Re ..... (Sask.) 122, 301
Millar, Kidd v. ..... (Alta.) 522
Miller v. Malepart ..... (Que.) 186, 274
Miller, Messenger v. ..... (N.S.) 197
Miller Morse Hardware Co. v. Smart. ..... (Sask.) 335
Miller, Reid v. ..... (Ont.) 196
Miller, Stahl v. ..... (Can.) 472
Miller, Stephen v. ..... (B.C.) 245
Miller v. Tipling ..... (Ont.) 218
Miller v. Young ..... (Ont.) 574
Millette, Belgo-Canadian Pulp and Paper Co. v. ..... (Que.) 384
Mills v. Continental Bag and Paper Co. ..... (Ont.) 147
Mills v. Sherwood Stores .. (Sask.) 382, 383
Milos, Rink v. ..... (Sask.) 576
Milton Pressed Brick v. Whalley. (Ont.) 393
Minhinnick R. v. ..... (Ont.) 552
Minnedosa, Town of, Wong Sing v... ..... (Man.) 419
Minnekahda Land Co., Marsden v... ..... (B.C.) 120
"Minnie A," The, Young v. (Ex.) 178, 376
Mitchell, Re ..... (Ont.) 598, 606
Mitchell and Fraser, Re ..... (Ont.) 352
Mitchell v. Johnson ..... (Man.) 222
Mitchell v. Mortgage Co. of Canada.. ..... (Sask.) 344
Mitchell v. Renfrew ..... (B.C.) 205
Mitten, J. I. Case Threshing Machine Co. v. ..... (Sask.) 505
Mizon v. Pohoretzky ..... (Ont.) 150
Moke, R. v. ..... (Alta.) 232, 286, 557
Molden v. Kirkeby & Keehn ... (Alta.) 588
Molsons Bank, Battle Island Paper Co. v. ..... (Que.) 54, 97
Molsons Bank v. Cranston.... (Ont.) 272
Molsons Bank, McKeen v. ..... (Que.) 456
Monarch Bank Re; Murphy's Case.... ..... (Ont.) 110
Monarch Bank, Re; Simon's Case .... (Ont.) 110
Mongeau v. St. Cyr ..... (Que.) 480
Monkman and Canadian Order of Chosen Friends, Re ..... (Ont.) 311
Monsour, Tremblay v. ..... (Que.) 448
Montgomery-Campbell and Northfield Coal Co., The King v. ..... (Ex.) 254

Mon-Mon.] COLUMN

Montmagny, Town of, v. Letourneau.. ..... (Can.) 33
Montreal Abattoirs v. Colwell .. (Que.) 467
Montreal Abattoirs v. Court Recorder ..... (Que.) 494
Montreal Abattoirs, Vachon v. .... (Que.) 202, 582
Montreal Abattoirs v. Wm. Davies.... ..... (Que.) 510
Montreal Ammunition Co. v. Parent ..... (Que.) 561
Montreal, Bank of, Dubreuil v. . (Que.) 53
Montreal Board of Trade, Canadian Freight Ass'n v. ..... (Ry.Bd.) 80
Montreal Board of Trade v. C.P.R. Co. ..... (Ry. Bd.) 77
Montreal, City of, Belair v. .... (Que.) 418
Montreal, City of, Boisjoly v. .. (Que.) 281
Montreal, City of, Bourdon v... (Que.) 32
Montreal, City of, Cogne v. .... (Que.) 422
Montreal, City of, v. C.P.R. Co..... ..... (Ry. Bd.) 488
Montreal, City of, Dambrosio v.. (Que.) 423
Montreal, City of, v. Décarie ... (Que.) 427
Montreal, City of, Delahanty v.. (Que.) 425
Montreal, City of, Del Solo v. .. (Que.) 371
Montreal, City of, Dufresne v... (Que.) 256
Montreal, City of, Gallagher v... (Que.) 176
Montreal, City of, v. Garneau . (Que.) 427
Montreal, City of, Godin v. .... (Que.) 420
Montreal, City of, Gratton v. ... (Que.) 423
Montreal, City of, v. G.T.R. Co. .... (Ry. Bd.) 489
Montreal, City of, Henry Morgan Co. v. ..... (Que.) 90
Montreal, City of, Laberge v... (Que.) 427
Montreal, City of, Lacroix v. ... (Que.) 545
Montreal City of, McAvoy v... (Que.) 367
Montreal City of, Menard v.... (Que.) 416
Montreal, City of, v. Montreal Tramways ..... (Que.) 540
Montreal, City of, v. Morgan & Co. ..... (Que.) 417
Montreal, City of, Newman v. .. (Que.) 423
Montreal, City of, Robin v. .... (Que.) 426
Montreal, City of, Rourke v... (Que.) 416
Montreal, City of, v. Smith ... (Que.) 428
Montreal, City of, v. Tritt.. (Que.) 428, 547
Montreal Fireman's Benefit Ass'n, Marquis v. ..... (Que.) 316
Montreal Fruit Auction Co. v. Payne ..... (Que.) 510
Montreal General Hospital v. Colonial Real Estate Co. ..... (Que.) 477
Montreal Investment & Realty Co., Denis v. ..... (Que.) 578
Montreal Light & Power Co. and City of Montreal, Desautels v. .. (Que.) 421
Montreal Locomotive Works, Botara v. ..... (Que.) 233
Montreal Locomotive Works, Freeman v. ..... (Que.) 382
Montreal Machine Shop, Delangie v. ..... (Que.) 387
Montreal North, Town of, Hayes v. ..... (Que.) 468
Montreal Protective Shoemakers, Wohlk v. ..... (Que.) 56

Mon-Mor.] COLUMN

Montreal Public Service Corp., Picard v. ..... (Que.) 384, 387
Montreal Public Service Corp., Senécal v. ..... (Que.) 222
Montreal & Southern Counties R. Co., East Greenfield Park v... (Ry. Bd.) 88
Montreal Tramways Co., Alexander v. ..... (Que.) 3
Montreal Tramways, City of Montreal v. ..... (Que.) 540
Montreal Tramways Co. v. Dougan ..... (Que.) 342
Montreal Tramways Co., Forest v..... ..... (Que.) 206
Montreal Tramways Co., Fortin v... ..... (Que.) 430, 531, 559
Montreal Tramways Co. v. Hamilton. ..... (Que.) 438
Montreal Tramways, Laberge v.. (Que.) 48
Montreal Tramways Co., Maurizio v. ..... (Que.) 3
Montreal Tramways Co. v. McDonnell ..... (Que.) 530
Montreal Tramways Co., Mercier v. ..... (Que.) 342
Montreal Tramways Co., Merry v..... ..... (Que.) 559
Montreal Tramways Co. v. Mulhern.. ..... (Can.) 530
Montreal Tramways Co., Normandin v. ..... (Que.) 175
Montreal Tramways Co. v. Rothchild ..... (Que.) 558
Montreal Tramways Co. v. Savignac.. ..... (Que.) 384, 531
Montreal Transportation Co., Lennon v. ..... (Que.) 121, 385
Montreal Transportation Co., McFee v. ..... (Que.) 75, 315
Montreal Trust Co., Robert v. ..(Can.) 113
Moodie, Georgeson v. .....(Alta.) 363
Moore v. Confederation Life Ass'n.. ..... (B.C.) 162, 305
Moore v. Niagara, St. Catharines and Toronto R. Co. .....(Ont.) 437
Moore, R. v. .....(Ont.) 326
Moore Tp., Magill v. .....(Ont.) 283
Moose Jaw, City of, Garrett v. .(Sask.) 381
Morency v. Gagnon .....(Que.) 44
Morency v. Leblond .....(Que.) 584
Morgan, Campbell v. .....(Man.) 332
Morgan & Co., City of Montreal v..... ..... (Que.) 417
Morgan, Henry, Co. v. City of Montreal ..... (Que.) 90, 480, 494
Morgan, Lees v. .....(Ont.) 245
Morin, Coté v. .....(Que.) 277
Morin v. Gaoler of Kamouraska..... ..... (Que.) 276, 277
Morin, Langlois v. .....(Que.) 590
Morin, Osmun v. .....(Que.) 274
Morin, R. v. .....(Alta.) 94
Morin, R. v. .....(Que.) 297
Morin v. Tardif .....(N.B.) 443
Morinville Oil City Land Co., Hetu v. ..... (Alta.) 580
Morkill, Duberger v. .....(Que.) 91

Mor-Nag.] COLUMN

Morran v. Railway Passengers Assn'ce Co. .....(Ont.) 315
Morris, Cromwell v. .....(Alta.) 13
Morrison, R. v. .....(N.S.) 15
Morrison, Twaites v. .....(Alta.) 463, 506
Morrisset, Gohier v. .....(Que.) 139
Morrow Cereal Co., Ogilvie Flour Mills Co. v. .....(Ont.) 23
Morse Co-Operative Supply Co. v. Coates .....(Sask.) 110
Morse, Kizer v. .....(N.S.) 336
Morse v. Mac & Mac Cedar Co. .... (B.C.) 160, 230
Morson, City of Toronto v. .... (Ont.) 182, 540
Mortgage & Agreement Purchase Co. v. Bell .....(Man.) 401
Mortgage Co. of Canada, Mitchell v. ..... (Sask.) 344
Mortimer v. Fesserton Timber Co. .... (Ont.) 39
Morwick, Reid v. .....(Ont.) 291
Moscovitch v. Forget .....(Que.) 38
Mountain Sights v. Dagenais ..(Que.) 571
Mousley v. Trudel .....(Que.) 582
Mousseau, Pepin v. .....(Que.) 445
Moyes Chemical Co. and Halsted, Re; Re Shepard Chemical Co....(Ont.) 409
Muir, Gardiner v. .....(Sask.) 59, 451
Mulhern, Montreal Tramways Co. v... ..... (Can.) 530
Mullins, R. v. .....(N.B.) 535
Municipal Act, Re Gates' Case (B.C.) 544
Munitions & Machinery v. Quebec, Montreal & Southern R. Co..... ..... (Ry. Bd.) 80
Munns, Albertan Pub. Co. v. ...(Alta.) 362
Munsey, Mercure v. .....(Que.) 468
Murcheson, Glen Falls Ins. Co. v. (Que.) 235
Murphy, Ex parte .....(N.B.) 535
Murphy v. City of Toronto ...(Ont.) 381
Murphy v. McMillan .....(N.B.) 3, 7
Murphy, R . v. (No. 1) .....(N.S.) 26
Murphy's Case, Monarch Bank Re.. ..... (Ont.) 110
Murphy and Gould v. The King .... (Can.) 398
Murray and Mahoney, R. v. (Alta.) 24, 558
Musgrave & Co., N.S. Dredging Co. v. ..... (N.S.) 473
Mutual Fire Ins. Co. v. Lalancette.. ..... (Que.) 216
Mutual Life Ass'nce Co. v. Blackett.. ..... (Alta.) 400
Mutual Life Ass'nce Co., B.C. Securities v. ..... (B.C.) 19, 262
Mutual Life Ass'nce Co., Dom. Trust Co. v. ..... (B.C.) 19, 262
Mutual Life Ass'nce Co., Douglas v. ..... (Can.) 407
Mutual Life Ass'nce, Harvey v..(Que.) 17
Mutual Life Ass'nce Co., McKinlay v. ..... (B.C.) 350
Myers v. Malepart .....(Que.) 275
Myers v. Théort .....(Que.) 130

Nagazoa v. Niquet.....(Que.) 325, 536
Nagle, Thomas, The King v.....(Ex.) 249

Nai-Nic.] COLUMN

Nairn Estate, Re.....(Man.) 549
Nantel, Paradis v.....(Que.) 229
Nash and Canadian Order of Chosen Friends, Re.....(Ont.) 315
Nashwaak Pulp & Paper Co. v. Wade.....(N.B.) 586
Nathanson v. G.T.R. Co.....(Ont.) 76
National Benefit Life Ass'ce Co. v. McCoy.....(Can.) 120
National Cartage & Supply Co. v. Belleau.....(Que.) 373
National Gas, Dominion Natural Gas v.....(Ont.) 141
National Life Assurance Co., Brand v.....(Man.) 30
National Mfg. Co., Clements v.....(Sask.) 97, 435
National Surety Co., Ferrara v.....(Can.) 478
National Trust Co. v. Matheson.(Ont.) 245
Natural Gas, Light & Appliance Co., Re.....(Alta.) 238
Naud v. Ferron.....(Que.) 222
Naud v. Lambert.....(Que.) 286
Nazzareno, R. v.....(Ont.) 327
Neigel, R. v.....(Alta.) 609
Neilson, The King v.....(N.S.) 553
Neilson, R. v.....(N.S.) 6, 527
Nelles, Campbell v.....(Que.) 453
Nelson v. C.P.R. Co.....(Can.) 486
Nelson, Knolinski v.....(Alta) 166
Nelson v. Pacific Great Eastern R. Co.....(B.C.) 127, 171, 486, 585
Nesbitt v. Ottawa Electric R. Co.(Ont.) 438
Nesbitt, Royal Bank v.....(Alta.) 463
Neville Canneries v. The "Santa Maria".....(Ex.) 217
New Carlton Hotel, Martin v....(Que.) 331
New Ontario Timber Co. v. McDonald.....(Ont.) 151
Newcombe, Re.....(Ont.) 609
Newcombe v. Evans.....(Ont.) 592
Newcombe, The King v.....(N.S.) 531
Newman v. City of Montreal....(Que.) 423
Newman v. Edmonton, Dunvegan & B.C.R. Co.....(Ry. Bd.) 85
Newton v. Botsford.....(Man.) 23
Newton, Hamelin v.....(Man.) 180
New Toronto Board of Trade v. Village of New Toronto.....(Ont.) 529
New Westminster, City of, Albion Motor Express Co. v.....(B.C.) 17, 436
New Westminster, City of, v. Kennedy.....(B.C.) 547
New York Central & Hudson River R. Co., Ingersoll Packing Co. v.....(Ont.) 29, 617
New York Life Ins. Co., Dominion Trust Co. v.....(P.C.) 5, 26, 117, 314
New York, State of, v. Israelowitz.....(B.C.) 185, 256, 257, 259
Niagara Grain and Feed Co., McPherson v.....(Ont.) 507
Niagara, St. Catharines and Toronto R. Co., Moore v.....(Ont.) 437
Nichol, De Laval Dairy Supply Co., v.....(Sask.) 97
Nichols v. McNeil.....(Can.) 291

Nic-N.S.] COLUMN

Nichols & Shepard v. Chamberlain.....(Sask.) 502, 505
Nicholson, Langton v.....(Sask.) 476
Nickerson, Crowell v.....(N.S.) 198
Nickson Co., Dominion Creosoting v.....(Can.) 104
Nicola Valley Lumber Co., Meeker v.....(Can.) 568
Nicole, Lenghan v.....(Que.) 293
Nicolet v. Village of Villers.....(Que.) 281
Nipissing Coca Cola Bottle Works, Barchard & Co. v.....(Ont.) 96
Niquet, Nagazoa v.....(Que.) 325, 536
Noble v. Campbellford, Lake Ontario & Western R. Co.....(Ry. Bd.) 24
Noble v. Lashbrook.....(Sask.) 195
Noble v. Tp. of Esquesing.....(Ont.) 469
Noecker v. Noecker.....(Ont.) 155, 368
Noel v. The King.....(Ex.) 585
Noel v. Roy.....(Que.) 548
Noiseux v. City of Lachine.....(Que.) 395
Nolet, Picard v.....(Que.) 334
Noonan, Armand v.....(Ont.) 510
Norcross Bros. v. Gohier.....(Can.) 227
Normandin v. Montreal Tramways Co.....(Que.) 175
North British & Mercantile Ins. Co., Boutry v.....(Alta.) 306
North Cowichan v. Hawthornthwaite.....(B.C.) 546
North Lancaster Exchange v. Bell Telephone Co.....(Ry. Bd.) 550
North Pacific Lumber Co. v. Sayward.....(B.C.) 483
North Shore Power Co. v. Lebel..(Que.) 421
North Vancouver, Re.....(B.C.) 357
North Vancouver Horticultural Society v. North Vancouver.....(B.C.) 542
Northern Alberta Natural Gas Co., Pelican Oil & Gas Co. v.....(Alta.) 207
Northern Construction Co., Gibbs v.....(B.C.) 443
Northern Construction Co., Hogan v.....(Alta.) 341
Northern Crown Bank, Re; Re Land Titles Act.....(Sask.) 354
Northern Crown Bank, Egbert v.....(P.C.) 273
Northern Life Assurance Co., Lang v.....(Alta.) 202
Northern Lumber Mills v. Rice.....(Ont.) 39, 395
Northern Navigation Co., Clement v.....(Ont.) 435
Northern Shirt Co. v. Clark.....(Ex.) 458
Northern Trust Co. v. Wasylkovsky.....(Sask.) 407
Norton, Re.....(Alta.) 130
Norwich Fire Ins. Soc., Anderson v.....(Que.) 307
Norwich Union Fire Insurance Co., Maldover v.....(Ont.) 304
Notre Dame, Corp. of, Cloutier v (Que.) 425
Notre-Dame-de-Stanbridge, Bédard v.....(Que.) 221
N.S. Dredging Co. v. Musgrave & Co.....(N.S.) 473
N.S. Steel & Coal Co. v. Sydney Mines.....(N.S.) 545

N.S.-Ord.] COLUMN

N.S. Tramways Co. v. Employers Liability Ass'n. Co.....(N.S.) 306
N.S. Tramways Co., Whitford v..(N.S.) 531
N.S. Tramways and Power Co., Re.....(N.S.) 528
N. S. Tramways & Power Co., Davie v.....(N.S.) 437
Nugent, Richardson v.....(N.B.) 442
Nutt v. Marshall.....(Que.) 147

Oak Bay, District of, City of Victoria v.....(B.C.) 514
Oak Tire Co., McCurdy v.....(Ont.) 204
Oakville, Town of, v. Cranston...(Can.) 285
Oakville, Town of, v. G.T. and C.P.R. Cos.....(Ry. Bd.) 90
O'Brien, Bergeron v.....(Que.) 15
O'Brien, De Felice v.....(Que.) 509
O'Brien v. Fraser & Gallagher...(N.B.) 394
O'Brien, The King v.....(N.B.) 91
O'Brien, The King v.....(Que.) 208
O'Brien, R. v.....(N.B.) 93
O'Brien, R. v.....(Sask.) 189
O'Brien Bros. v. C.P.R. Co...(Ry. Bd.) 488
O'Byrne, Quebec Heights v.....(Que.) 618
Ocean Accident & Guarantee Corp., Larose v.....(Alta.) 336
O'Dell v. City of London.....(Ont.) 463
O'Dell v. Toronto R. Co.....(Ont.) 437
Ogdensburg Coal Co., Evans v...(Que.) 518
Ogilvie Flour Mills Co. v. Morrow Cereal Co.....(Ont.) 23
O'Grady v. Lecomte.....(Man.) 58
O'Hendley v. Cape Breton Electric Light Co.....(N.S.) 441
Okanagan Telephone Co. v. Summerland Telephone Co.....(B.C.) 284
Okopny v. Atlas Construction Co.....(Que.) 18, 387
Olds v. Paris.....(B.C.) 372
O'Leary v. Smith.....(N.B.) 443
O'Leary, Village of Ste. Geneviève v.....(Que.) 4
Olivier v. Roger.....(Que.) 221, 484
Olson, Western Trust Co. v (Sask.) 354, 482
O'Mealey v. Swartz....(Sask.) 11, 129, 506
O'Meara, Corby Distillery Co. v..(Que.) 111
O'Neil v. Carbonneau..(Que.) 275, 277, 537
O'Neil v. G.T.R. Co.....(Ont.) 379
O'Neill v. O'Neill.....(Ont.) 63
Ontario Asphalt Block Paving Co., Town of Oshawa v.....(Ont.) 145
Ontario Fruit Growers Ass'n v. Canadian Freight Ass'n.....(Ry. Bd.) 81
Ontario-Hughes-Owens v. Ottawa Elec. R. Co.....(Ont.) 439
Ontario & Minnesota Power Co., Durant v.....(Ont.) 434
Ontario & Minnesota Power Co., Girton v.....(Ont.) 587
Ontario & Minnesota Power Co., Smith v.....(Ont.) 587
Ontario Power Co. v. Toronto Power Co.....(Ont.) 300
Ontario Temperance Act, Re; Renaud's Application.....(Ont.) 328
Opsal, Woods v.....(B.C.) 345, 588
Orban v. Levy.....(Que.) 148
Orde v. Rutter.....(B.C.) 399

Ord-Pap.] COLUMN

Order of Canadian Home Circles, Baker v.....(Ont.) 308
Order of Canadian Home Circles, Grainger v.....(Ont.) 237
Orillia, Town of, Laurence v.....(Ont.) 285
Orkin, Malherbe v.....(Que.) 377
Orr, Re; Cameron v. Church of Christ.....(Can.) 595
Orth v. Hamilton, G. & B. Electric R. Co.....(Ont.) 438
Osborne and Campbell, Re.....(Ont.) 200
Oshawa Board of Water Comm. v. Robson Leather Co.....(Ont.) 495
Oshawa, Town of, v. Ontario Asphalt Block Paving.....(Ont.) 145
Osmun v. Morin.....(Que.) 274
O'Sullivan v. Canadian Klondyke Mining Co.....(Yukon) 167
Ott, Burkett v.....(Ont.) 134
Ottawa, City of, Bell Telephone Co. v.....(Ry. Bd.) 552
Ottawa, City of, and Butterworth Re..(Ont.) 414
Ottawa, City of, German v.....(Can.) 436
Ottawa, City of. Tessier v.....(Ont.) 438
Ottawa Electric R. Co., Nesbitt v (Ont.) 438
Ottawa Electric R. Co., Ontario-Hughes-Owens v.....(Ont.) 439
Ottawa Electric Co., Racicot v...(Ont.) 530
Ottawa Gas Co., Gerard v.....(Ont.) 432
Ottawa Hockey Ass'n., Toronto Hockey Club v.....(Ont.) 99
Ottawa, Magistrate of, Rose v...(Que.) 343
Ottawa Separate Schools, Re.....(Ont.) 127
Ottawa Separate School Trustees v. Quebec Bank.....(Ont.) 129, 334
Otto v. Roger and Kelly.....(Ont.) 216
Ouellette v. Boulay.....(Que.) 447
Ouellette v. Plante.....(Que.) 67
Ouimet v. Fleury.....(Que.) 269
Ouimet, Swift Canadian Co. v....(Que.) 53
Ouseley, Chisholm & Thomson, C.N.R. Co. v.....(Sask.) 32
Owen Sound Lumber Co., Re....(Ont.) 118
Owen Sound Wire Fence v. U.S. Steel Products.....(Ont.) 143
Oxford Knitting Co., Duell v....(Ont.) 205

Pacaud v. Lebrecque .....(Ont.) 573
Pacaud v. Limoges .....(Que.) 395
Pachal v. Germania Fire Ins. Co.....(Sask.) 312, 451
Pacific Great Eastern R. Co., Nelson v. ..... (B.C.) 127, 171, 486, 585
Page v. Gauvreau .....(Que.) 280
Page, Martel v. .....(Que.) 214
Pageau, Amyot v. .....(Que.) 147
Pagnuelo, Giguère v..... (Que.) 62
Paiement v. Boisvert .....(Que.) 163
Painchaud, Trahan v. ....(Que.) 108, 454
Pallen v. The "Iroquois" .....(Ex.) 100
Palmason v. Kjernested ..(Man.) 408, 472
Palmer-McLellan Shoepack Co., John Palmer v. .....(N.B.) 173
Paltiel v. Paltiel .....(Que.) 289
Panetta v. C.P.R. Co. .....(B.C.) 199
Papineau v. Papineau .....(Que.) 21
Papineau, Riopelle v. ... (Que.) 368, 578

Paq-Pel.]	COLUMN
Paquet, Pilots' Corp. of Quebec Harbor v. ....(Que.)	517
Paquet v. St. Laurent ....(Que.)	269
Paquette v. Beauvais ....(Que.)	498
Paquette v. Labelle ....(Que.)	269
Paradis, Fontaine v. ....(Que.)	385
Paradis v. Nantel ....(Que.)	229
Pare v. Carette Co. ....(Que.)	231
Parent, Dufresne v. ....(Que.)	316
Parent v. Matte .... (Que.) 14,	17
Parent v. Mendelsohn ....(Ont.)	473
Parent v. Merchants' Ass'nce Co.... ....(Que.)	317
Parent, Montreal Ammunition Co. v... ....(Que.)	561
Paris, Olds v. ....(B.C.)	372
Pariseau, Tracey v. ....(Que.)	206
Parish of St. Barnabe, Belanger v... ....(Que.)	422
Parker, Thornton v. ....(Que.)	597
Parker v. Trustee Co. of Winnipeg.. ....(Man.)	570
Parks, Farnell v. ....(Alta.)	589
Parsons & Son, Lamontagne v. ....(Que.) 136,	157
Pas, Town of, The, v. G.N.W. Telegraph Co. ....(Ry. Bd.)	550
Pasel v. Hamilton Street R. Co..(Ont.)	195
Patenaude, Beauchamp v. ....(Que.)	590
Patenaude v. Canada Cement Co.... ....(Que.)	391
Patenaude, Frechette v. ....(Que.)	210
Patenaude, Gauthier v. ....(Que.)	37
Patenaude, McCall v. ....(Que.)	340
Paterson, Re, Re Prudential Life Ins. Co. ....(Man.)	113
Patrick, Fox v. ....(Ont.)	62
Patrick King, The King v. ....(Ex.)	197
Patterson v. C.P.R. Co. ....(Alta.)	123
Patterson v. Toronto General Trusts Corp. ....(Ont.)	205
Patterson v. Victoria School Trustees ....(B.C.)	513
Patterson, Wilson v. .... (Alta.) 36,	521
Paulin v. Freinstein ....(Man.)	45
Pauss v. Wright ....(Que.)	507
Paxton v. Walker ....(Que.)	572
Payette, Bourdon v. ....(Que.)	518
Payette, Dinardo v. ....(Que.)	341
Payette v. Hébert ....(Que.)	165
Payne, Montreal Fruit Auction Co. v. ....(Que.)	510
Pearson, Beaulieu ....(Que.)	290
Peck Rolling Mills, Harris v. ...(Que.)	389
Peck Rolling Mills, Sabatino v. ..(Que.)	388
Peebles v. Pfeifer ....(Sask.)	508
Peel v. Peel ....(Ont.)	212
Pelchat, La Pierre v. ....(Que.)	570
Pelican Oil & Gas Co. v. Northern Alberta Natural Gas Co. ..(Alta.)	207
Pélissier v. Lachine, Jacques-Cartier R. Co. ....(Que.)	174
Pelissier v. Primeau ....(Que.)	467
Pellant, Village of Joliette v. ...(Que.)	14
Pellerin v. Blanchard ....(Que.)	4
Pelletier v. Lagace ....(Que.)	143
Pelletier v. Pilon .... (Que.)	271
Pelletier v. Stack ....(Que.)	432

Pel-Pig]	COLUMN
Pelodeau, Roi v. ....(Que.)	289
Peloquin v. Plante ....(Que.)	466
Pemberton v. Cole ....(Alta.)	575
Penberthy v. Coiner ....(Ont.)	156
People's Dairy, Willis v. ....(Ont.)	150
People's Gas Supply Co., Prest-O-Lite Co. v. .... (Can.)	554
People's Trust Co., Re ....(B.C.)	116
Pepin, Bertrand v. ....(Que.)	163
Pepin v. Mousseau ....(Que.)	445
Peppiatt v. Reeder ....(Ont.) 194,	458
Perkins Electric v. Electric Specialty.. .... (Ont.)	151
Perlman v. Piché and Att'y-Gen'l of Canada; Re Habeas Corpus. (Que.)	125
Perodeau v. Lacombe ....(Que.)	534
Pérodeau v. Quéry ....(Que.)	454
Perras v. Grace ....(Que.)	143
Perras, Peters v. ....(Can.)	64
Perrault v. Lacombe ....(Que.)	463
Perrault v. Fonciere Victoriaville.... .... (Que.)	571
Perry v. Perry ....(Man.) 24,	603
Perry, Superior Copper Co. v. ..(Ont.)	615
Perry and Sutton, Superior Copper Co. v. .... (Ont.)	616
Pesant, Comtois v. ....(Que.)	512
Pesant, Lapointe v. ....(Que.)	290
Pesha v. C.P.R. Co. ....(Ont.)	74
Peterborough, County of, Hatton v... .... (Ont.)	412
Peters, Braun v. ....(Sask.)	139
Peters v. Charlot ....(N.B.)	35
Peters v. Perras ....(Can.)	64
Peters, R. v. ....(N.S.)	223
Peterson Lake Silver Cobalt Mining Co. v. Dominion Reduction Co... .... (Ont.)	398
Peterson v. Wickson .... (Man.)	567
Petit, Lachance v. ....(Que.) 228,	567
Petrie Manufacturing Co., The King v. ....(Ex.)	249
Petry, Chapman v. ....(Que.)	176
Pettibone, R. v. ....(Alta.)	1
Peuchen, McDonald v. ...(Ont.) 295,	332
Pfeifer, Peebles v. ....(Sask.)	508
Philip, Dinsmore v. ....(B.C.) 228,	472
Philip, McKee v. ....(Can.)	473
Phillips, Boulter-Waugh v. ....(Sask.)	406
Phoenix Ins. Co., Babayan v. ..(Ont.)	312
Phoenix Ins. Co., Lalande v. ....(Que.) 311,	313
Picard, Bar of Quebec v. ....(Que.)	520
Picard, The King v. .... (Ex.)	251
Picard v. Montreal Public Service Corp. .... (Que.)	384
Picard, Montreal Public Service Corp. v. .... (Que.)	387
Picard v. Nolet ....(Que.)	334
Picard, Sap v. ....(Que.)	9
Piché and Att'y-Gen'l of Can., Perlman v. .... (Que.)	125
Piche, Blanshay v. ....(Que.)	396
Piche v. L'Union St. Joseph de Lachine .... (Que.)	315
Pichon v. The "Alliance No. 2".... .... (Ex.)	516
Pigeon, Dubuc v. ....(Que.)	294

Pig-Pri.] COLUMN

Piggott v. Hedrick ..... (Ont.) 64
Pikey v. Pyne ..... (Ont.) 567
Pilkington v. Kent ..... (B.C.) 401
Pilon, Pelletier v. ..... (Que.) 271
Pilots Corp. of Quebec Harbour v. Paquet ..... (Que.) 517
Pinault, Reid v. ..... (Que.) 121, 290
Pink, McMillan v. ..... (Ont.) 523
Pinkerton v. Burns ..... (Que.) 459
Pion, Contant v. ..... (Que.) 210
Pion v. School of St. Stanislas..... ..... (Que.) 466, 469
Pioneer Tractor Co., Re ..... (Alta.) 119
Pirie, Ex parte ..... (N.B.) 327
Pixley v. Bedford ..... (Sask.) 196
Plante, Ouellette v. ..... (Que.) 67
Plante, Peloquin v. ..... (Que.) 466
Plimley, Brandon v. ..... (B.C.) 502
Pneuma Tubes, Seagram v. ... (Ont.) 331
Podersky, Dickson v. ..... (Alta.) 319
Pohlman v. Times Printing Co.. (Ont.) 364
Pohoretzky, Mizon v. ..... (Ont.) 150
Pointe Claire School, Lacroix v..... ..... (Que.) 514
Poirier v. Ladouceur ..... (Que.) 261
Poisson v. The King ..... (Ex.) 481
Poitras Woolen Mills v. Feathers.... ..... (Que.) 340
Polak, Rae v. ..... (Ont.) 408
Policy Holders' Mutual Ins. Co., Foxwell v. ..... (Ont.) 308
Poliquin v. Longshoremen's Union.. ..... (Que.) 106
Pollard, R. v. ..... (Alta.) 35. 536
Pollock v. Holitski ..... (Sask.) 285
Polson Iron Works, Heinston & Sons v. ..... (Ont.) 151
Ponteix, Village of, Imperial Elevator & Lumber Co. v. ..... (Sask.) 413
Pootmans v. Regina Grain Co.. (Sask.) 68
Pope v. Royal Bank ..... (Can.) 111
Popliger v. Glazer ..... (Que.) 337
Poplis v. Chaput ..... (Que.) 48
Porhorliuk, R. v. ..... (Alta.) 190
Port Stanley, Town of, and Taylor, Re ..... (Ont.) 415
Portelance, Suthergill v. ..... (Que.) 509
Portneuf, School of, Marcotte v.. (Que.) 515
Poulin v. Houde ..... (Que.) 462
Poulin, Laroche v. ..... (Que.) 464
Poulin and Village of L'Orignal, Re ..... (Ont.) 420
Poupart v. Beaudin ..... (Que.) 507
Powell v. Thomas ..... (Alta.) 379, 382
Power v. The King ..... (Can.) 254
Premier Coal Co. v. Canadian Freight Ass'n ..... (Ry. Bd.) 81
Prentice v. Merrick ..... (B.C.) 475
Prest-O-Lite Co. v. People's Gas Supply Co. ..... (Can.) 554
Price Brothers v. Saint Louis.. (Que.) 387
Price, McFarlane v. ..... (Ont.) 410
Price v. Ruggles ..... (Man.) 569
Primeau, Pelissier v. ..... (Que.) 467
Primeau, Villeneuve v. 34
Prince Albert, City of, Hook v. (Sask) 381
Prince Rupert, The, The Cleeve v. (Ex.) 198
Princeton Colliers, Gregory v... (B.C.) 525

Pri - Que.] COLUMN

Pringle v. Wisconsin Electric Co. (Ont.) 475
Protestant Bd. of School Comm'rs v. Quinlan ..... (Que.) 18
Proulx v. Le Blanc ..... (Que.) 533
Prouse v. C.N.R. Co. ..... (Man.) 490
Prouty, Lefebvre v. ..... (Que.) 107
Provincial Light, Heat & Power Co. v. Latrielle ..... (Que.) 174
Provincial Stone & Supply Co. v. C.P.R. Co. ..... (Ry. Bd.) 86
Provincial Trust Co., Thompson v..... ..... (Que.) 194
Provost, R. v. ..... (Que.) 260
Prudential Life Ins. Co., Re .. (Man.) 17
Prudential Life Ins. Co., Re, Re Paterson ..... (Man.) 113
Prudential Trust Co. v. International Construction Co. ..... (Que.) 237
Prudential Trust Co., The King v... ..... (Ex.) 249
Prudhomme v. Decarie ..... (Que.) 449
Pulos, Kladis v. ..... (Que.) 291
Purdy, R. v. ..... (Ont.) 326
Purdy v. Rur. Mun. of Langenburg.. ..... (Sask.) 546
Pusic, St. Amour v. ..... (Que.) 513
Pyne v. C.P.R. Co. ..... (Man.) 74
Pyne, Pikey v. ..... (Ont.) 567

Quagliotti, Bell v ..... (B.C.) 155
Quaker Oats Co., Gearhart v.... (Sask.) 68
Quebec Bank, Beaver Lumber Co. v ..... (Sask.) 393
Quebec Bank, City of Toronto v.. (Ont.) 540
Quebec Bank, Ottawa Separate School Trustees v..... (Ont.) 129, 334
Quebec, Bar of, v. Picard ..... (Que.) 520
Quebec, City of, Fafard v ..... (Can.) 424
Quebec, City of, v. Lampson (Can.) 138, 182
Quebec College of Dental Surgeons, Mailett v..... (Que.) 480
Quebec Fire Ins. Co., Gorochowsky v. ..... (Que.) 167
Quebec Gas Co., and City of Quebec, The King v..... (Ex.) 248
Quebec Harbour, Pilots Corp. of, v. Paquet..... (Que.) 517
Quebec Heights v. O'Byrne..... (Que.) 618
Quebec Improvement Co., The King v. ..... (Ex.) 252
Quebec, Montreal & Southern R. Co., Giroux v..... (Que.) 3
Quebec, Montreal & Southern R. Co., Munitions & Machinery v (Ry. Bd.) 80
Quebec North Shore Turnpike Rd. Trustees, The King v..... (Ex.) 19
Quebec Realty Co., Blais v..... (Que.) 473
Quebec & Saguenay R. Co., Att'y-Gen'l of Canada v..... (Ex.) 493
Quebec Southern R. Co., Beland v (Que.) 134
Queen's Park Corporation v. Levenick ..... (Sask.) 575
Queen Victoria Niagara Falls Park Electrical Development Co. v.... (Ont.) 465
Quéry, Pérodeau v..... (Que.) 454
Quesnel Forks Gold Mining Co. v. Ward and Cariboo Gold Mining Co. ..... (B.C.) 526

Qui-Rei.	COLUMN
Quinlan, Barry v. (Que.)	348
Quinlan, Protestant Bd. of School Comm'rs v. (Que.)	18
Quinlan & Robertson v. Town of St. John. (Que.)	420
Rabinovitch v. Cohen (Que.)	9
Racicot v. Ottawa Electric Co. (Ont.)	530
Racine v. Dansereau (Que.)	214
Raifman, Carson v. (Que.)	46
Railway Passenger Ass'nce. Co., Att'y-Gen'l for Ontario v. (Ont.)	105
Railway Passengers Ass'nce Co., Morran v. (Ont.)	315
Raine v. G.T.R. Co (Que.)	75
Rainy River, Town of, and Campbell, Re (Ont.)	420
Ralston v. Tanner (Ont.)	148
Rameau, Chagnon v. (Que.)	43
Ramey v. Marcus (N.S.)	61
Ramsay, Re. (B.C.) 129,	564
Randall, Gee & Mitchell, Fulton v. (Alta.)	11
Randall v. Sawyer-Massey Co. (Ont.)	507
Randolph, Berlin Machine Works v. (N.B.) 159,	231
Ranger, R. v. (Que.) 233,	235
Rankin, R. v. (Ont.)	325
Rapid Motor Co. v. Dagenais (Que.)	50
Rat Portage Lumber Co. v. Harty (Ont.)	267
Ratz, Kay v. (Alta.) 299,	497
Rea v. Polak (Ont.)	408
Reach (A. J.) Co. v. Crosland (Ont.) 219,	539
Reardon, Franklin v. (Can.)	134
Reaycraft, Little v. (Que.)	294
Record Printing Co., Allan v. (Ont.)	365
Recorder's Court, Drapeau v. (Que.) 16,	415
Recorder's Court, Galibert v. (Que.)	495
Redman, R. v. (Sask.)	323
Redmond v. Stacey (Ont.)	364
Reeder, Peppiatt v. (Ont.) 194,	458
Reeves, Schaal v. (Sask.)	371
Reford v. The Stadium (Que.)	614
Regent Construction Co. v. Johnson (Que.)	70
Regent Construction Co., Johnson v. (Que.)	478
Regimbald, Michelakis v. (Que.)	337
Regina Board of Trade v. C.P.R. Co. (Ry. Bd.)	82
Regina, City of, v. Armour (Sask.)	197
Regina, City of, v. Armour and McCarthy (Sask.)	197
Regina, City of, Douglas v. (Sask.)	283
Regina, City of, v. McCarthy (P.C.)	515
Regina, City of, Smith v. (Sask.)	439
Regina, City of, v. Western Trust Co. (Can.)	383
Regina Grain Co., Pootmans v. (Sask.)	68
Regina Public School, Gratton Separate School v. (Sask.)	515
Registrar-General of Titles, Alberni Land Co. v. (B.C.)	201
Reid, Re (B.C.) 129,	564
Reid, Brander v. (Que.)	168
Reid v. Miller (Ont.)	196
Reid v. Morwick (Ont.)	291
Reid v. Pinault (Que.) 121,	290
Reimer v. Rosen (Man.)	144

Rei-Rex.	COLUMN
Reinhart v. Burgar (Ont.)	152
Rene, Gouin v. (Que.)	210
Renfrew, Mitchell v. (B.C.)	205
Reuttenberg v. Reuttenberg (Que.)	214
Rex v. Anderson and Sparks (Sask.)	187
Rex v. Archibald (N.S.)	48
Rex v. Bainbridge (Ont.)	187
Rex v. Barlow (Alta.)	93
Rex v. Berenstein (B.C.)	15
Rex v. Bissette (Alta.)	94
Rex v. Bosomworth (Alta.) 26,	558
Rex v. Bracci (Ont.)	93
Rex v. Brunet (Que.)	21
Rex v. Calvin (Alta.)	186
Rex v. Cameron (N.S.)	57
Rex v. Campbell's Pharmacy (Sask.)	324
Rex v. Carswell (Ont.)	326
Rex v. Carver (Alta.)	190
Rex v. Chadderton (Alta.)	126
Rex v. Chung Chan (B.C.)	329
Rex v. Clarke (Alta.)	93
Rex v. Condola (Ont.)	327
Rex v. Coyne (Alta.)	370
Rex v. Creighton (Alta.)	322
Rex v. Cross (Ont.)	208
Rex v. Cyr (Alta.) 343, 535,	566
Rex v. Debard (Ont.)	57
Rex v. Di Francesco (Ont.)	443
Rex v. Drake (N.S.)	50
Rex v. Dumont (Que.)	235
Rex v. Duncan (Ont.)	186
Rex v. Fiola (Que.)	517
Rex. v. Fong Quing and Fong Toy (N.S.)	328
Rex v. Fox (Alta.)	526
Rex v. Giroux (Que.)	188
Rex v. Green (Alta.) 26,	558
Rex v. Hackam (Ont.)	8
Rex v. Ham (B.C.)	266
Rex v. Hanley (Ont.) 331,	535
Rex v. Harris (Ont.)	190
Rex v. Harrison (B.C.) 34, 35,	259
Rex v. Harrison (Sask.)	187
Rex v. Harvey and Taylor (Ont.)	123
Rex v. Hoffman (Man.) 92,	322
Rex v. Hogue (Ont.) 202,	558
Rex v. Hyder (Sask.)	27
Rex v. Illsley (N.S.) 260,	263
Rex v Iwanachuk (Alta.)	275
Rex v. Jackson (Ont.) 95, 224,	566
Rex v. Jacobs (Que.)	16
Rex v. Karp (Ont.) 185,	553
Rex v. Kimbrough (Alta.)	553
Rex v. Kleparczuk (Alta.)	441
Rex v. Laderoute (Alta.)	322
Rex v. La Vesque (N.B.) 459,	517
Rex v Leduc (Ont.)	329
Rex v. Lee Kee (Alta.)	186
Rex v. Letain (Man.) 234,	440
Rex v. Lynch-Staunton (Ont.)	323
Rex v. Mackay (Alta.)	561
Rex v. Mackey (N.S.) 275, 277, 286,	296
Rex v. Maclean (Alta.)	323
Rex v. Malcolm and Olson (Alta.)	120
Rex v. Martin (Ont.)	295
Rex v. McAuley (Man.)	288
Rex v. McCarthy (Ont.)	185
Rex v. McCranor (Ont.)	327
Rex v. McEwan (Ont.)	322
Rex v. McManus (Alta.)	535

Rex-Ric.] COLUMN

Rex v. Minhinnick.....(Ont.) 552
Rex v. Moke.....(Alta.) 232, 286, 557
Rex v. Moore.....(Ont.) 326
Rex v. Morin.....(Alta.) 94
Rex v. Morin.....(Que.) 297
Rex v. Morrison.....(N.S.) 15
Rex v. Mullins.....(N.B.) 535
Rex v. Murphy (No. 1).....(N.S.) 26
Rex v. Murray and Mahoney (Alta.) 24, 558
Rex v. Nazzareno.....(Ont.) 327
Rex v. Neigel.....(Alta.) 609
Rex v. Neilson.....(N.S.) 6, 527
Rex v. O'Brien.....(N.B.) 93
Rex v. O'Brien.....(Sask.) 189
Rex v. Peters.....(N.S.) 223
Rex v. Pettibone.....(Alta.) 1
Rex v. Pollard.....(Alta.) 35, 536
Rex v. Porhorliuk.....(Alta.) 190
Rex v. Provost.....(Que.) 260
Rex v. Purdy.....(Ont.) 326
Rex v. Ranger.....(Que.) 233
Rex v. Rankin.....(Ont.) 325
Rex v. Redman.....(Sask.) 323
Rex v. Richmond.....(Alta.) 535
Rex v. Robinson.....(Sask.) 370
Rex v. Rodney.....(Ont.) 188
Rex v. Rosarri.....(Ont.) 322
Rex v. Rusko.....(N.S.) 91
Rex v. Ruttka.....(Alta.) 566
Rex v. Scales and Roberts.....(Ont.) 418
Rex v. Shaak.....(Alta.) 208
Rex v. Shatford.....(N.S.) 94, 166, 330
Rex v. Shaw.....(Man.) 127
Rex v. Sit Quinn.....(B.C.) 327
Rex v. Sparkes.....(N.S.) 286
Rex v. Stackhouse.....(N.S.) 223
Rex v. Stokes.....(Man.) 190
Rex v. Stone.....(Alta.) 320
Rex v. Tansley.....(Alta.) 229
Rex v. Theriault.....(N.B.) 93
Rex v. Thorburn.....(Ont.) 526
Rex v. Van Fleet.....(Alta.) 328, 330, 537
Rex v. Welford.....(Ont.) 325
Rex v. Western Wine & Liquor Co. .....(Alta.) 322
Rex v. Willson.....(Alta.) 277
Rex v. Wong Joe.....(B.C.) 93, 188
Rex ex rel Brankley v. McManus (Alta.) 330
Rex ex rel Johnson v. James (Sask.) 188, 190
Rex ex rel Tiderington v. Rose (Alta.) 236, 325
Rex ex rel Turner v. Stone.....(Alta.) 321
Reynolds, Appleton v.....(Que.) 268
Reynolds v. Jackson.....(Sask.) 511
Rheault v. Brown Corp.....(Que.) 366
Rheault v. Landry.....(Que.) 610
Rheaume v. Cliche.....(Que.) 536
Rheaume, Trudel v.....(Que.) 171, 391
Rhineland, Tennant v.....(Man.) 350
Riberdy v. Tremblay.....(Que.) 338
Ricard, Labelle v.....(Que.) 464
Rice, Northern Lumber Mills v...(Ont.) 395
Richard Young Co. v. Brodeur...(Que.) 478
Richards, Baker v.....(B.C.) 360
Richards, Williams v.....(B.C.) 334
Richardson v. Gilbertson.....(Ont.) 69
Richardson & McMeans, Colonial Invest. & Loan Co. v.....(Man.) 400
Richardson v. Nugent.....(N.B.) 442

Ric-Rog.] COLUMN

Richelieu, Corp. of, Cournoyer v..(Que.) 180
Richmond, Corp. of, Evans v (B.C.) 333, 435, 557
Richmond, R. v.....(Alta.) 535
Richmond School Dist. v. Garbutt .....(Alta.) 548
Richstone v. Right.....(Que.) 459
Rink v. Milos.....(Sask.) 576
Riopelle v. Papineau.....(Que.) 368, 578
Riordan, McDougall v.....(B.C.) 69
Rioux, Village of Beloeil v.....(Que.) 68
Rioux v. Village of Trois-Pistoles..(Que.) 412
Ripka v. Georgetown Collieries..(Alta.) 27
Ripstein v. City of Winnipeg..(Man.) 33, 197
Ritchie v. Edmonton Milling Co (Alta.) 404
Ritchie v. Spence.....(Que.) 376
Rithet, The King v.....(Ex.) 115
Rivers v. George White & Sons...(B.C.) 506
Robb v. Merchants Casualty Co. (Man.) 306
Roberge, Thivierge v.....(Que.) 448
Robert, Brien v.....(Que.) 359
Robert v. Charbonneau.....(Que.) 338
Robert v. Latourelle.....(Que.) 346
Robert v. Martin.....(Que.) 203
Robert v. Montreal Trust Co....(Can.) 113
Robert v. Robert.....(Que.) 594
Robert v. Sarault.....(Que.) 570
Robert Bell Engine & Thresher Co. v. Farquharson.....(Sask.) 501
Robert Simpson Co., Coop v.....(Ont.) 441
Robertson v. Guilbault.....(Que.) 267, 455
Robertson's Case; Re Lands & Homes of Canada.....(Man.) 104
Roberval, Village of, Delisle v....(Que.) 427
Robidoux v. Denis.....(Que.) 460
Robidoux v. Royal Bank.....(Que.) 53
Robillard, Rousseau v.....(Que.) 54
Robin v. City of Montreal.....(Que.) 426
Robin Hood Mills v. Haimson..(Alta.) 238
Robin Hood Mills, Hilton v.....(Sask.) 433
Robinson, Re.....(Sask.) 594
Robinson v. Burgeson.....(Sask.) 504
Robinson v. Dodge.....(Man.) 435
Robinson v. London Life Ins. Co.(Ont.) 314
Robinson, R. v.....(Sask.) 370
Robinson v. Robinson.....(Ont.) 289
Robitaille, Verret v.....(Que.) 298
Roblin v. Vanalstine.....(Ont.) 62
Robson Investment Co., Re Winding-up Act, and.....(B.C.) 401
Robson Leather Co., Oshawa Bd. of Water Comm'rs. v.....(Ont.) 495
Roche, Re; Re MacSwiney.....(Ont.) 397
Rochester and Mersea, Tps. of, Anderson v.....(Ont.) 282
Rochon, Hart v.....(Que.) 361
Rochon v. Lavigne.....(Que.) 507
Rodden v. Sauriol.....(Que.) 137
Rodney, R. v.....(Ont.) 188
Rodrigue, Parish of St. Prosper v.(Can.) 418
Roe v. Tp. of Wellesley.....(Ont.) 282
Roger and Kelly, Otto v.....(Ont.) 216
Roger, Olivier v.....(Que.) 221, 484
Rogers v. Calgary Brewing & Malting Co.....(Can.) 61
Rogers v. General Accident Fire & Life Ass'ce Co.....(Ont.) 308
Rogers v. Mercantile Fire Ins. Co. (Ont.) 308
Rogers & Co., Hall Motors v.....(Ont.) 509

Rog-Roy.]	COLUMN
Rogers Lumber Yards v. Stuart	(Sask.) 239
Rogers Realty Co. v. Swift Current	(Can.) 14
Rohoel v. Darwish	(Alta.) 20, 233
Roi v. Pelodeau	(Que.) 289
Rolland v. Ball and Prefontaine	(Que.) 596
Roman Catholic Arch. Corp. of St. Boniface v. Town of Transcona	(Can.) 544
Roman Catholic Episcopal Corp., Town of Eastview v	(Ont.) 90
Romovitz, Victor v	(Ont.) 568
Rompré, Laurentides Paper Co. v	(Que.) 366
Ronson, Re	(Ont.) 606
Rosarri, R. v	(Ont.) 322
Rosborough v. Trustees of St. Andrew's Church	(Can.) 607
Rose v. Magistrate District of Ottawa	(Que.) 343
Rose, Tiderington v	(Alta.) 236, 325
Rosen, Reimer v	(Man.) 144
Rosenberg, Re	(Man.) 257, 258, 275
Rosetown Elec. Light & Power Co., McGee v	(Sask.) 194
Ross v. Amiot	(Que.) 572
Ross v. Ste. Anne	(Que.) 448
Ross v. Scottish Union and National Ins. Co	(Ont.) 306
Ross v. Stovall	(Alta.) 522
Rossi v. Scottish Canadian Magnesite Co	(Que.) 388
Roth v. South Easthope Farmers Mutual Fire Insurance Co	(Ont.) 314, 315
Rothchild, Montreal Tramways Co. v	(Que.) 558
Rothesay, Parish of, Ex parte, Re McLean	(N.B.) 550
Rouillard, Coulombe v	(Que.) 501
Roumegous, Faye v	(Ont.) 457
Rountree v. Wood	(Ont.) 134
Rourke v. City of Montreal	(Que.) 416
Rousseau v. Dubois	(Que.) 372
Rousseau v. Robillard	(Que.) 54
Routhier, Ingle v	(Que.) 477
Rouxel v. Royal Bank	(Sask.) 53
Rowan v. Toronto R. Co	(Ont.) 559
Rownson v. Imperial Steel and Iron Co.	(Ont.) 135
Roy, Campeau v	(Que.) 318
Roy v. Canadian Bank of Commerce	(B.C.) 53
Roy, Equitable Realty v	(Que.) 463
Roy v. Girouard	(Que.) 214
Roy, Noel v	(Que.) 548
Roy v. St. Onge	(Que.) 462
Roy, Shapiro v	(Que.) 373
Roy, Swan v	(Que.) 135
Roy v. Village of Grand Mère	(Que.) 448
Royal Agricultural School and Duclos, Re	(Que.) 117
Royal Bank v. Banque D'Hochelaga	(Sask.) 319
Royal Bank v. Gold	(B.C.) 64
Royal Bank v. Johnston	(Ont.) 54
Royal Bank, McKillop v	(Can.) 55
Royal Bank v. McLennan	(B.C.) 526
Royal Bank v. Nesbitt	(Alta.) 463
Royal Bank, Pope v	(Can.) 111
Royal Bank, Robidoux v	(Que.) 53

Roy-St. O.]	COLUMN
Royal Bank, Rouxel v	(Sask.) 53
Royal Bank v. Skeans (No. 1)	(B.C.) 616
Royal Bank v. Wallis	(Alta.) 204
Royal Trust Co., Stephens v	(B.C.) 494
Rubber Regenerating Co., Manchuck v.	(Que.) 268, 386, 391
Rubberset Co. v. Boeckh Brothers	(Ont.) 555
Ruel v. The King	(Ex.) 250
Ruggles, Price v	(Man.) 569
Rumlos v. Sherwin	(Que.) 37, 172
Rush v. Clark	(N.B.) 560
Rusko, R. v	(N.S.) 91
Russell, Clavelle v	(Sask.) 568
Russell v. Russell	(Can.) 355
Rutherford, Re	(Ont.) 602
Rutter, Orde v	(B.C.) 399
Ruttka, R. v	(Alta.) 566
Ryan, Germain v	(Que.) 362
Ryan v. Wills	(Ont.) 107
Rynd v. Tp. of Blanshard	(Ont.) 425
Saba v. Duchow	(Que.) 180, 347
Sabatino v. Peck Rolling Mills	(Que.) 388
Sabbath v. Libercent	(Que.) 352
Sahekik v. Duhamel	(Que.) 43
"St. Alice," The, Cowan v	(Ex.) 516
St. Alphonse, School of, v. Continental Light and Heat Co	(Que.) 516
St. Amand, Re	(Ont.) 601
St. Amour v. Pusie	(Que.) 513
St. Andrew's Church, Trustees of, Rosborough v	(Can.) 607
St. Anne, Ross v	(Que.) 448
St. Barnabe, Parish of, Bourassa v	(Que.) 418
St. Bonaventure v. Leblanc	(Que.) 67
St. Boniface, Corp. of, Roman Catholic Arch. v. Town of Transcona	(Can.) 544
St. Catherine St. Realty Co. v. Loranger	(Que.) 238
St. Charles, Friedman v	(Que.) 196
St. Cyr, Halpern v	(Que.) 92
St. Cyr, Mongeau v	(Que.) 480
St. David, Parish of, v. Sevigny	(Que.) 589
St. Denis v. Gingras	(Que.) 397
St. Elizabeth School Commissioners of, v. Lafreniere	(Que.) 514
St. Foye and Parent v. Matte	17
St. Geneviève, Village of, v. O'Leary	(Que.) 4
St. George Mansions v. Hetherington	(Ont.) 346
St. Germain v. City of Lachine	(Que.) 221
St. Jacques v. Parish of St. Jean Berchmans	(Que.) 389
St. Jean, Village of, Lord v	(Que.) 66
St. John, Town of, Quinlan & Robertson v	(Que.) 420
St. Joseph, Corp. of, Turcotte v	(Que.) 283
St. Joseph, Sisters of, v. Walsh	(Ont.) 601
St. Laurent, Paquet v	(Que.) 269
St. Lawrence Flour Mills Co. v. Stewart	(Can.) 378
St. Louis, Price Brothers v	(Que.) 387
St. Mathias, The Parish of, Darche v.	(Que.) 415
St. Maurice Paper Co. v. Marcotte	(Que.) 390
St. Onge, Roy v	(Que.) 462

St. P.-Sco.] COLUMN

St. Paul Fire & Marine Ins. Co., Goderich Mfg. Co. v.....(Ont.) 28
St. Prosper, Parish of, v. Rodrigue (Can.) 418
St. Stanislas, School of, Pion v (Que.) 466, 469
St. Thècle, Village of, v. Matte..(Que.) 369
Sale of Shares Act, Re, United Grain Growers Case.....(Sask.) 108
Salter v. Dominion Creosoting Co. .....(Can.) 166, 531
Samuels v. Dominion Bank.....(Ont.) 470
"Sandefjord," The, In re.....(Ex.) 479
Sandwich, Windsor and Amherstburg Railway v. City of Windsor (Ont.) 529
San Martin Mining Co. v. Ingeniera Importadora Y. Contratista Co. .....(Que.) 63, 168, 335, 470....
"Santa Maria," The, Neville Canneries v.....(Ex.) 217
Sap v. Picard.....(Que.) 9
Sarault, Robert, v.....(Que.) 570
Sarrazin, Lafleur v.....(Que.) 459
Saskatoon, City of, Butler and McLorg v.....(Sask.) 419, 421
Saskatoon, City of, Etter v.....(Sask.) 47
Saskatoon and Moose Jaw Bds. of Trade C.P.R. Co. v.....(Ry. Bd.) 81
Satallick v. Jarrett & Redick....(Sask.) 455
Sault au Recollet, School Commr's of, Deschatelets v.....(Que.) 182
Sauriol, Rodden v.....(Que.) 137
Savard v. Trudel.....(Que.) 39
Savignac, Montreal Tramways Co. v .....(Que.) 384, 531
Sawyer v. Tp. of Sherborne.....(Ont.) 280
Sawyer-Massey, Law and McLean v. .....(Alta.) 475
Sawyer-Massey, Randall v.....(Ont.) 507
Sayed v. Canadian Tube & Iron Co. .....(Que.) 390
Sayward, North Pacific Lumber Co. v .....(B.C.) 483
Scales and Roberts, R. v.....(Ont.) 418
Scanlin v. C.P.R. Co.....(Man.) 75
Scarborough, Major v.....(Que.) 37
Scatcherd, Re.....(Ont.) 244
Schaal v. Reeves.....(Sask.) 371
Schafer, Beby v.....(Que.) 336
Schell v. McCallum & Vannatter (Can.) 273
Schetky & Acadia v. Cochrane...(B.C.) 204
Schinck v. Galibert.....(Que.) 389
Schneider v. Laurentides Brique Co. .....(Que.) 105
Schneider, Therrien v.....(Que.) 397
Schofield v. Emerson Brantingham Implement Co.....(Can.) 504
Schon, King v.....(Alta.) 476
Schulz, Stroscherer v.....(Alta.) 568
Scotstown, Town of, Canada Investment v.....(Que.) 416
Scott v. Fisher.....(Ont.) 507
Scott v. Harris.....(Alta.) 372
Scott & Co. v. McCain Produce Co.(N.B.) 26
Scott and Scott, Re, Waugh, Re..(Ont.) 597
Scottish Canadian Magnesite Co., Rossi v.....(Que.) 388
Scottish Union and National Ins. Co., Ross v.....(Ont.) 306
Scown v. Herald Publishing Co...(Can.) 362

Sea-Sit.] COLUMN

Seagram v. Kemish.....(Ont.) 512
Seagram v. Pneuma Tubes.....(Ont.) 331
Seaton, Henry v.....(Que.) 244
Seattle Construction & Dry Dock Co., v. Grant Smith & Co.....(B.C.) 344
Secord v. Keith.....(Alta.) 114
Securities Limited, Walshaw v...(Ont.) 405
Security Traffic Bureau v. C.N.R. Co. .....(Ry. Bd.) 86
Security Trust Co. v. Stewart...(Alta.) 97
Seidman, Canadian Consolidated Rubber Co. v.....(Que.) 360
Seilo Estate, Re.....(Sask.) 216
Seinbaine v. Christopherson and Sask. Guarantee Co.....(Sask.) 42
Sellers v. Sullivan.....(Ont.) 593
Sellers, Malden Pub. School Bd. v.(Ont.) 557
Sénécal v. Charest.....(Que.) 4, 168
Senécal v. Montreal Public Service Corp.....(Que.) 222
Séquin, Cousineau v.....(Que.) 584
Sevigny, Parish of St. David v...(Que.) 589
Sewrey, Lechiw v.....(Man.) 46, 464
Shaak, R. v.....(Alta.) 208
Shaefer v. The King.....(Que.) 28
Shannahan v. Brown.....(Ont.) 501
Shapiro v. Roy.....(Que.) 373
Shatford, R. v.....(N.S.) 94, 166, 330
Shaunavon, Town of, Eakins v..(Sask.) 281
Shaw, Hossack v.....(Can.) 319
Shaw, R. v.....(Man.) 127
Shaw, Way v.....(Ont.) 407
Shearer, Hutchinson v.....(Alta.) 49
Sheehy, Sherwood v.....(Ont.) 140
Sheffield, Simmons v.....(Alta.) 179
Shepard and Merchants Bank v. Br. Dom's Gen. Ins. Co.....(Sask.) 316
Shepard and Merchants Bank v. Glens Falls Ins. Co.....(Sask.) 316
Shepard and Rosevear and Moyes Chemical Co., Re, Moyes Chemical Co. and Halsted, Re.....(Ont.) 409
Sheppard, Bulletin Co. v.....(Can.) 363
Sherborne, Tp. of, Sawyer v.....(Ont.) 280
Sherbrooke, City of, Audet v....(Que.) 424
Sherman, Wood v.....(B.C.) 171
Sherwin, Rumlos v.....(Que.) 37, 172
Sherwood v. Sheehy.....(Ont.) 140
Sherwood, Rur. Mun. of, v. Wilson .....(Can.) 544
Sherwood Stores, Mills v...(Sask.) 382, 383
Shewczuk v. Breeko.....(Alta.) 497
Shields, Re.....(Ont.) 367
Shields v. Shields.....(Ont.) 410
Shorten v. The King.....(Can.) 236
Sicotte, Labonte v.....(Que.) 348
Siemon, Ward v.....(Ont.) 109
Sierichs v. Hughes.....(Ont.) 156
Silks Limited v Irons.....(Ont.) 457
Silverman, Weiss v.....(Que.) 392
Silverwood, Cummings v.....(Sask.) 319
Simmons v. Sheffield.....(Alta.) 179
Simon's Case; Monarch Bank Re (Ont.) 110
Simons' Case; Re Consolidated Investments Ltd.....(Alta.) 112
Simpson v. Local Board of Health of Belleville.....(Ont.) 173, 431
Simson v. Young.....(Can.) 523, 579
Sit Quinn, R. v.....(B.C.) 327

Sit-Spi.] COLUMN

Sit Way, John Hing Co. v....(B.C.) 22, 457
Skeans, Royal Bank v.....(B.C.) 616
Slayton, Evans v.....(Que.) 594
Smart, Douglas v.....(Ont.) 238
Smart, Miller Morse Hardware Co. v. .....(Sask.) 335
Smiles v. Edmonton School District .....(Alta.) 430
Smith, Re.....(Alta.) 302
Smith, Re.....(Ont.) 298, 597
Smith, Re.....(Que.) 510
Smith v. Brunswick Balke Collender Co. .....(B.C.) 432
Smith, City of Montreal v.....(Que.) 428
Smith v. City of Regina.....(Sask.) 439
Smith v. Crawford.....(Sask.) 19, 576
Smith v. Curry.....(Man.) 218
Smith v. Gosnell.....(Ont.) 177
Smith v. G.T.R. Co.....(Que.) 388
Smith v. Mackenzie.....(Ex.) 99
Smith, Membery v.....(Que.) 280
Smith v. Merchants Bank.....(Ont.) 335
Smith, O'Leary v.....(N.B.) 443
Smith v. Ontario and Minnesota Power Co.....(Ont.) 587
Smith v. Smith.....(N.S.) 352
Smith v. Spencer.....(Sask.) 136
Smith v. Standard Trusts Co...(Man.) 196
Smith v. Tp. of Tisdale.....(Ont.) 29, 166
Smith, Walsh v.....(N.S.) 7
Smith v. Weir.....(Que.) 385, 387
Smyth, Colonial Investment & Loan Co. v.....(Sask.) 399
Smyth, James v.....(Man.) 405
Sneeth, Hetting v.....(Ont.) 473
Snipe Lake, Rur. Mun. of, v. Martin .....(Sask) 539
Snitzler Advertising Co. v. Dupuis (Ont.) 1
Snook, Baldwin v.....(Man.) 58
Solicitors, Re.....(Ont.) 173
Solin, Kaswan v.....(Que.) 51, 468
Solvang, Re.....(Alta.) 8
Somers, Mayfair Investments v..(Ont.) 557
Somerville, Lynch-Staunton v....(Ont.) 172
Somerville, Stark v.....(Ont.) 69, 150
Sorel, City of, Strathcona Fire Ins. Co. v. .....(Que.) 426
Sorel, City of, Valois v.....(Que.) 126
Sorel v. Hebert.....(Que.) 60
Sorgius, Bouchard v.....(Can.) 16
Soulard, Bureau v.....(Que.) 221
South Easthope Farmers Mutual Fire Insurance Co., Roth v..(Ont.) 314, 315
South Vancouver, Gold v.....(B.C.) 32
Southby v. Southby.....(Ont.) 52
Southern Alberta Hay Growers v. C.P.R. Co.....(Ry. Bd.) 86
Spaner Bros. v. Central Canada Express Co.....(Alta.) 76
Spark, McMullin v.....(Que.) 338
Sparkes, R. v.....(N.S.) 286
Sparks v. Clement.....(Ont.) 137
Sparling, Flood v.....(Que.) 210
Spearman v. G.T.R. Co.....(Que.) 174
Spellman and Litovitz, Re.....(Ont.) 574
Spence, Ritchie v.....(Que.) 376
Spencer, Smith v.....(Sask.) 136
Spiegelberg v. Helleur .....(Que.) 510
Spiliotopulos v. The King.....(Que.) 538

Spr-Str.] COLUMN

Spratt, Basil v.....(Ont.) 56
Spruce Grove, Rur. Mun. of, Sutherland v.....(Alta.) 356, 547, 549
Squires, Theatre Amusement Co. v..... .....(Sask.) 502
Stacey, Redmond v.....(Ont.) 364
Stack, Pelletier v.....(Que.) 432
Stackhouse v. Lorimer.....(Que.) 463, 464
Stackhouse, R. v.....(N.S.) 223
Staddon v. Liverpool Manitoba Ass'nce Co.....(Ont.) 307
Stadium Co., Langevin v.....(Que.) 113
Stadium, The, Reford v.....(Que.) 614
Stahl v. Miller.....(Can.) 472
Stair, Bank of Montreal v.....(Ont.) 265
Stamp, Re.....(Ont.) 599
Standard Paint Co., Diamonde Metal Co. v.....(Que.) 512
Standard Reliance Mortgage Co. v. Stubbs.....(Can.) 318
Standard Trusts Co. v. Kolbe...(Sask.) 243
Standard Trusts Co., Smith v....(Man.) 196
Starfilms, Jacobs v.....(Que.) 60
Stark, Anson v.....(Que.) 162
Stark v. Somerville.....(Ont.) 69, 150
Steele v. Cape Breton Electric Co.(N.S.) 557
Steenson, Wallbridge v.....(Sask.) 515, 546
Stephen v. Miller.....(B.C.) 245
Stephens v. Royal Trust Co.....(B.C.) 494
Stephens, Vyse Sons & Co. v.....(Que.) 349
Sterling Bank v. Thorne.....(Ont.) 59
Sterling, Stewart v.....(Ont.) 363
Stevens v. Merchants Bank.....(Man.) 52
Stevenson v. Dandy.....(Alta.) 228
Stewart, Ex parte.....(N.S.) 326
Stewart, Denault v.....(Que.) 112
Stewart, St. Lawrence Flour Mills Co. v. .....(Can.) 378
Stewart, Security Trust Co. v....(Alta.) 97
Stewart v. Sterling.....(Ont.) 363
Stewart Estate, Re.....(Sask.) 358
Stewart-Moore, Wardroper v.(B.C.) 22, 138
Stinson and Town of Fort Frances, Re.. .....(Ont.) 417
Stock v. Meyers.....(Ont.) 497
Stokes v. Leavens.....(Man.) 292
Stokes, R. v.....(Man.) 190
Stokes-Stephens Oil Co. and McNaught Re.....(Alta.) 32, 33, 34
Stokes-Stephens Oil Co. v. McNaught.. .....(Can.) 30
Stollery, Anderson v.....(B.C.) 400
Stone, Burritt v.....(Sask.) 138
Stone, R v.....(Alta.) 320
Stone, Turner v., Rex ex rel.....(Alta.) 321
Stone v. World Newspaper.....(Ont.) 364
"Storstad," The, C.P.R. Co. v..... .....(Can.) 6, 99
Stothers v. Toronto General Trusts Corp. .....(Ont.) 66
Stovall, Ross v.....(Alta.) 522
Stowe v. G.T.P.R. Co.....(Alta.) 233
Strachan v. Taylor.....(Que.) 582
Strang, Henderson v.....(Ont.) 111
Strathcona Fire Ins. Co. v. City of Sorel .....(Que.) 426
Strathcona (Lord), Re Estate of..... .....(Man.) 548, 607

Str-Tes.]	COLUMN
Straus Land Corp. v. International Hotel Windsor (Ont.)	347
Stringer v. City of Edmonton (Alta.)	422
Stroscherer v. Schulz (Alta.)	568
Struthers v. Chamandy (Ont.)	40
Stuart, Rogers Lumber Yards v. (Sask.)	239
Stubbs, Standard Reliance Mtge. Co. v. (Can.)	318
Sturgeon Consolidated Colliers Band v. (Alta.)	139
Stychlinsky v. Canadian Steel Foundries (Que.)	206, 386
Styles v. Henderson (Man.)	318
Sullivan v. C.N.R. Co (Ont.)	492
Sullivan Machinery Co. v. Bank of Montreal (B.C.)	503
Sullivan, Sellers v (Ont.)	593
Summerland Telephone Co., Okanagan Telephone Co v (B.C.)	284
Sumner v. McIntosh (Sask.)	521
Superior Copper Co. v. Perry and Sutton (Ont.)	616
Superior Copper Co. v. Perry (Ont.)	615
Surveyer, Brentwood Realty Co. v (Que.)	469
Surveyer v. Town of Grand'Mere (Que.)	154
Susman v. Baker (Ont.)	144
Suthergill v. Portelance (Que.)	509
Sutherland v. Harris (Ont.)	25
Sutherland v. Rur. Mun. of Spruce Grove (Alta.)	356, 547, 549
Sutter v. Sutter (Ont.)	167
Swan v. Roy (Que.)	135
Swartz, O'Mealey v (Sask.)	11, 129, 506
Swift Canadian Co. v. Ouimet (Que.)	53
Swift Current, Rogers Realty Co. v (Can.)	14
Sydney, City of, Edwards v (N.S.)	24
Sydney, City of, Indian Reserve, Re (Ex.)	295
Sydney Mines, N.S. Steel & Coal Co. v. (N.S.)	545
Taggart, Re (Ont.)	297
Taillon v. Cote (Que.)	47
Tainter v. McKinnon (Alta.)	194, 524
Tanner, Ralston v (Ont.)	148
Tansley, R. v (Alta.)	229
Tardif, Morin v (N.B.)	443
Tard , Re (Alta.)	540
Tarrabian v. Ferring (Can.)	346
Tasse, Bigras v (Ont.)	261
Tassé, Marceau v (Que.)	292
Taylor, Brown's Travel Bureau v (B.C.)	309
Taylor v. City of Guelph (Ont.)	545
Taylor v. Davies (Ont.)	42, 563
Taylor v. Equitable Fire & Marine Ins. Co (Alta.)	36, 308
Taylor, Goodwin v (Ont.)	442
Taylor, Strachan v (Que.)	582
Taylor and Town of Port Stanley, Re (Ont.)	415
Telegram Printing Co. v. Knott (Can.)	363
Temiskaming Telephone Co. v. Town of Cobalt (Ont.)	550
Teney v. Marcil (Que.)	168
Tennant v. Rhineland (Man.)	350
Tessier v. City of Ottawa (Ont.)	438

The-Tor.]	COLUMN
Theatre Amusement Co. v. Squires (Sask.)	502
Théberge v. Dumesnil (Que.)	32
Theberge v. The King (Ex.)	430
Thede v. Hessenauer (Ont.)	528
Themens v. McDuff (Que.)	576
Théort, Myers v (Que.)	130
Theriault v. The King (Ex.)	191
Theriault, R. v (N.B.)	93
Therriault v. Caron (Que.)	387
Therrien v. Leet (Que.)	92
Therrien v. Schneider (Que.)	397
Thibault v. The King (Ex.)	73
Thibideau, Boutet v (Ont.)	300
Thivierge v. Roberge (Que.)	448
Thomas, Re (Ont.)	301
Thomas, Ex parte (N.B.)	228, 259
Thomas, Powell v (Alta.)	379, 382
Thompson v. Denny (B.C.)	165
Thompson v. Gatchell (Ont.)	522
Thompson, Gouin v (Que.)	482
Thompson, Kildonan Investments v (Can.)	13
Thompson, The King v (Ex.)	252
Thompson v. Provincial Trust Co (Que.)	194
Thomson, Merchants Bank v (Alta.)	562
Thorburn, R. v (Ont.)	526
Thorne, Sterling Bank v (Ont.)	59
Thornton v. Parker (Que.)	597
Tiderington v. Rose (Alta.)	236, 325
Tie Tie v. Desnoyers (Que.)	352
Times Printing Co., Pohlman v (Ont.)	364
Tipling, Miller v (Ont.)	218
Tisdale, Tp. of, Smith v (Ont.)	29, 166
Tizard, Vivian v (Sask.)	198
Tobin Mfg. Co., Giguère v (Que.)	433
Tompkins v. Tp. of Harwich (Ont.)	280
Took, Juneau v (Que.)	477
Tooke, Hains v (Que.)	460
Tooley v. Hadwen (Alta.)	522
Toronto Board of Trade v. Canadian Freight Ass'n (Ry. Bd.)	81
Toronto, City of, Bowles v (Ont.)	282, 423
Toronto, City of, v. C.N.R. Co (Ry. Bd.)	486
Toronto, City of, and Citizens Committee v. Express Traffic Ass'n (Ry. Bd.)	84
Toronto, City of, Crompton Corset Co. v (Ont.)	424
Toronto, City of, Fieldhouse v (Ont.)	425
Toronto, City of, and Grosvenor St. Presbyterian Church Trustees, Re (Ont.)	248
Toronto, City of, Heighington v (Ont.)	547
Toronto, City of, and Homan, Re (Ont.)	413
Toronto, City of, Hutchinson v (Ont.)	29
Toronto, City of, Jeffries v (Ont.)	424
Toronto, City of, Mackay v (Ont.)	429
Toronto, City of, McPherson v (Ont.)	376
Toronto, City of, v. Morson (Ont.)	182, 540
Toronto, City of, Murphy v (Ont.)	381
Toronto, City of, v. Quebec Bank (Ont.)	540
Toronto, City of, and Toronto R. Co., Re (Ont.)	27, 170, 238, 248, 529
Toronto, City of, Upper Canada College v (Ont.)	300, 542
Toronto General Trusts Corp. v. The King (Can.)	549

Tor-Tru.] COLUMN

Toronto General Trusts Corp., Patterson v.....(Ont.) 205
Toronto General Trusts Corp., Stothers v.....(Ont.) 66
Toronto General Trusts Corp. and McConkey, Re.....(Ont.) 30
Toronto and Hamilton Highway v. Coleman.....(Ont.) 163
Toronto Harbour Comm'rs., Watson v. .....(Ont.) 246
Toronto Hockey Club v. Ottawa Hockey Ass'n.....(Ont.) 99
Toronto Power Co., Ontario Power Co. v.....(Ont.) 300
Toronto R. Co., City of Toronto v (Ont.) 529
Toronto R. Co., Gallagher v.....(Ont.) 49
Toronto R. Co., Gazey v.....(Ont.) 530
Toronto R. Co., Hill v.....(Ont.) 533
Toronto R. Co. v. The King.....(P.C.) 14, 125, 446
Toronto R. Co., O'Dell v.....(Ont.) 437
Toronto R. Co., Rowan v.....(Ont.) 559
Toronto R. Co. and City of Toronto, Bar v.....(Ont.) 530
Toronto Suburban R. Co., Acton Tanning Co. v.....(Can.) 136
Toronto & York Radial R. Co., Dawson v.....(Ont.) 560
Toronto & York Radial R. Co., Gough v.....(Ont.) 170
Toronto & York Radial R. Co., McIlmurray v.....(Ont.) 195
Torosoff, Badger v.....(Sask.) 135
Torrens, The King v.....(Ex.) 256
Toth v. Hilkevics.....(Sask.) 503
Touks, Brown v.....(Ont.) 220
Townsend v. Holder.....(Que.) 59
Tracey v. Pariseau.....(Que.) 206
Trahan v. Painchaud.....(Que.) 108, 454
Trainshi v. C.P.R. Co.....(B.C.) 28, 351
Transcona, Town of, Roman Catholic Arch. Corp. of St. Boniface v..(Can.) 544
Traversy v. Bibeau.....(Que.) 585
Traynor and Catholic Mutual Benefit Ass'n., Re.....(Ont.) 314
Trca, Canadian Moline Plow Co. v.....(Alta.) 133
Treat, Esquimalt & Nanaimo R. Co. v. .....(B.C.) 200
Tremblay, Blondin v.....(Que.) 175
Tremblay v. Canada Cement Co.(Que.) 390
Tremblay v. Greater Winnipeg Water Dist.....(Man.) 146
Tremblay v. Monscur.....(Que.) 448
Tremblay, Riberdy v.....(Que.) 338
Treo Company Inc. v. Dominion Corset Co.....(Ex.) 458
Trester v. Desève.....(Que.) 153
Triskow and Children's Protection Act, Re.....(Alta.) 450
Tritt, City of Montreal v...(Que.) 428, 547
Trois-Pistoles, Village of, Rioux v (Que.) 412
Trois-Pistoles, Village of, v. Trois-Pistoles Electric Co.....(Que.) 420
Tropox v. Droney.....(Alta.) 521
Trudel, Cloutier v.....(Que.) 59
Trudel, Duchaine v.....(Que.) 154
Trudel v. The King.....(Ex.) 161
Trudel, Mousley v.....(Que.) 582

Tru-Van.] COLUMN

Trudel v. Rhéaume.....(Que.) 171, 391
Trudel, Savard v.....(Que.) 39
Trust & Loan Co. v. Courville....(Que.) 340
Trustee Act and Rules of Court, Re.... .....(Sask.) 122
Trustee Co. of Winnipeg, Parker v..... .....(Man.) 570
Trusts and Guarantee Co. v. Grand Valley R. Co. .....(Ont.) 493
Tschetter, The King v.....(Sask.) 553
Tudhope Anderson Co., McKay v. (Alta.) 474
Turcotte v. Corp. of St. Joseph...(Que.) 283
Turcotte, Leger v.....(Que.) 38
Turcotte, Lester v.....(Que.) 43
Turgeon, Cohen v.....(Que.) 39
Turnbull v. Graham.....(Alta.) 437
Turner v. Stone, Rex ex rel.....(Alta.) 321
Twaites v. Morrison.....(Alta.) 463, 506
Tyrrell v. Tyrrell.....(Ont.) 242

Unger v. Hettler Lumber Co.....(Ont.) 148
Union Bank v. Benson.....(Sask.) 62
Union Bank, Dominion Elevator Co. v. .....(Man.) 466
Union Bank v. Makepeace..(Ont.) 265, 272
Union Land Corp., Canadian Northern R. Co. v.....(Que.) 21
Union Natural Gas Co. v. Chatham Gas Co.....(Can.) 141
Union Supply Co. Caveat, Re..... .....(Sask.) 21, 181
United Grain Growers Case, Re Sale of Shares Act.....(Sask.) 108
United States Fidelity, Re..(B.C.) 129, 564
United States Steel Products, Owen Sound Wire Fence v.....(Ont.) 143
United States of America v. Allison.... .....(N.S.) 257
Universal Wardrobe Repair v. Berman Dyè Works.....(Que.) 582
Upper Canada College v. City of Toronto .....(Ont.) 300, 542
Uren v. Confederation Life Association .....(Ont.) 410
Usinovitch, Bondar v.....(Sask.) 206

Vachon, Arseneault v.....(Que.) 229
Vachon v. Montreal Abattoirs..... .....(Que.) 202, 582
Vaillancourt, Galibert v.....(Que.) 46
Vair, Buckley v.....(Ont.) 27
Valois v. City of Sorel.....(Que.) 126
Van, Goupil v.....(Que.) 386, 470
Vanalstine, Roblin v.....(Ont.) 62
Vancouver, City of, Blue Funnel Motor Line v.....(B.C.) 411
Vancouver, City of, v. B.C. Elec. R. Co.....(B.C.) 414
Vancouver, City of, Champion & White v.....(Can.) 584
Vancouver, City of, Chandler v...(B.C.) 415
Vancouver, City of, and McKay, Re... .....(B.C.) 373
Vancouver Lumber Co., The King v.... .....(Ex.) 481
Vandette v. Vandette.....(Que.) 597
Van Dorn v. Felger.....(Alta.) 292
Van Fleet, R. v.....(Alta.) 328, 330, 537
Vanier v. Bouthillier.....(Que.) 385

Van-Wam.]		COLUMN
Vanzant v. Coates	(Ont.)	201
Varennes, Parish of, Choquette v.	(Que.)	428
Vassar, Lindley v.	(B.C.)	403
Vassie & Co., The King v.	(Ex.)	249
Vaux, Bowes v.	(Ont.)	574
Veltre, London & Lancashire Fire Ins. v.	(Can.)	552
Vermette, Lefaivre v.	(Que.)	265
Verret, Collector of Revenue v.	(Que.)	50
Verret v. Robitaille	(Que.)	298
Vézina v. Lafortune	(Can.)	333
Vezina .v Meilleur	(Que.)	60
Viau, Léger v.	(Que.)	509
Victor v. Romovitz	(Ont.)	568
Victoria, City of, v. District of Oak Bay	(B.C.)	514
Victoria, City of, v. Mackay	(Can.)	57
Victoria, City of, Westholme Lumber Co. v.	(P.C.)	145
Victoria School Trustees, Patterson v	(B.C.)	513
Victoria-Vancouver Stevedoring Co., G. T.P. Coast Steamship Co. v.	(Can.)	140
Vidal v. Mercier	(Que.)	588
Villecourt v. Blais	(Que.)	351
Villeneuve v. Primeau	(Que.)	34
Villers, Village of, Nicolet v.	(Que.)	281
Vincent v. Hyde	(Que.)	175
Vinet v. Canadian Light & Power Co.	(Que.)	136, 151
Vivian v. Tizard	(Sask.)	198
Vousounara v. Kautsoginapoulos	(Que.)	362
Vyse Sons & Co. v. Stephens	(Que.)	349

Wan-Wet.]		COLUMN
Wabash R. Co., Folick v.	(Ont.)	492
Wade, Re.	(N.B.)	34
Wade, Duval v.	(Que.)	618
Wade v. James	(Ont.)	40
Wade, Nashwaak Pulp & Paper Co. v.	(N.B.)	586
Walch, Gladue v.	(Man.)	69
Wales, Fanning v.	(Ont.)	509
Walker, C.P.R. Co. v.	(Can.)	489
Walker, Charron v.	(Que.)	45, 500
Walker v. Lees	(B.C.)	290
Walker, Paxton v.	(Que.)	572
Walker v. Walker	(Man.)	209, 375
Walkerville, Town of, Holland v.	(Ont.)	424
Wallaceburg Cut Glass Works v. Canadian Freight Ass'n.	(Ry. Bd.)	86
Wallbridge Grain Co., Ltd., Re.	(Alta.)	112
Wallbridge v. Steenson	(Sask.)	515, 546
Wallis, Royal Bank v.	(Alta.)	204
Walmsley v. Hyatt	(Ont.)	472
Walpole Farmers' Mutual Fire Ass'ce Co., Forsyth v.	(Ont.)	306
Walsh v. International Bridge and Terminal Co.	(Ont.)	437
Walsh, Meagher v.	(Que.)	520
Walsh, Sisters of St. Joseph v.	(Ont.)	601
Walsh v. Smith	(N.S.)	7
Walsh v. Willaughan	(Ont.)	576
Walshaw v. Securities Limited.	(Ont.)	405
Walt v. Wright	(Ont.)	151
Walters, Cleveland Stove v.	(Que.)	59
Walton v. Berry	(Sask.)	14
Wamboldt v. Halifax & South Western R. Co.	(N.S.)	378
Wannamaker v. Livingston	(Ont.)	593
War Relief Act, Re	(B.C.)	400
War Relief Act, Re; Re Credit Foncier Franco-Canadien Co.	(Alta.)	399
Ward & Cariboo Gold Mining Co., Quesnel Forks Gold Min. Co. v.	(B.C.)	526
Ward v. Siemon	(Ont.)	109
Wardroper v. Stewart-Moore	(B.C.)	22, 138
Warman, Hickman v.	(Ont.)	575
Wasylkovsky, Northern Trust Co. v.	(Sask.)	407
Waterloo Local Bd. of Health, Re Campbell's Case	(Ont.)	29, 445
Waterman, Credit Canada v.	(Que.)	351
Watson v. Guillaume	(Sask.)	10
Watson v. Toronto Harbour Comm'rs	(Ont.)	246
Waugh, Re, Scott and Scott, Re.	(Ont.)	597
Waxman v. Girouard	(Que.)	175, 396
Way v. Shaw	(Ont.)	407
Wayagamack Pulp and Paper Co. v. Girard	(Que.)	438
Weiland, Hays v.	(Ont.)	205, 207
Weingart v. Jacobson	(Que.)	518
Weir, DeVisscher v.	(Sask.)	580
Weir, Smith v.	(Que.)	385, 387
Weiss v. Silverman	(Que.)	392
Welch, Gorgnigiani v.	(B.C.),	33, 383
Welford, R. v.	(Ont.)	325
Wellbanks, McKibbon v.	(Ont.)	564
Wellesley, Township of, Roe v.	(Ont.)	282
Wells, Hart-Parr Co. v.	(Can.)	508
Welsh, J. I. Case Threshing Mach. Co. v.	(Sask.)	504
Welton, Fleetwood v.	(N.B.)	41
Wentworth, C'ty of, v. Hamilton Radial Elec. R. Co.	(Ont.)	334, 529
West Canadian Coal Mining v. Lovett	(Que.)	51
Westcott v. City of Woodstock.	(Ont.)	282
Western Canada Flour Mills Co., Doner v.	(Ont.)	157
Western Club, Inman v.	(B.C.)	408
Western Realty Limited, Diamond v.	(Ont.)	576
Western Supply & Equipment Co., Imperial Bank v.	(Alta.)	36
Western Trust Co. v. City of Regina	(Can.)	383
Western Trust Co. v. Olson	(Sask.)	354, 482
Western Union Fire Ins. Co. v. Alexander	(B.C.)	112
Western Wine & Liquor Co., R. v.	(Alta.)	322
Westholme Lumber Co. v. City of Victoria	(P.C.)	145
Westholme Lumber Co. v. G.T.P.R. Co.	(B.C.)	196
Westland, Freehold Investment Co. v.	(Man.)	570
Westmount, City of, Doyle v.	(Que.)	436
Westwark Realty, La Prairie School Comm'rs v.	(Que.)	180
Wetaskiwin, City of, v. C. & E. Townsites	(Alta.)	412, 544

Wey-Win.] COLUMN

Weyburn Townsite v. Honsburger.... (Ont.) 102
Whalley, Milton Pressed Brick Co. v. (Ont.) 393
Wharton, Leonard v. (Ont.) 362
Wheaton, May v. (Ont.) 452
Wheeler v. Hisey (Ont.) 474
Whimbey v. Whimbey ... (Ont.) 166, 211
White v. Belleperche (Ont.) 579
"White," The, Farrel v. (Ex.) 517
White & Sons, Rivers v. (B.C.) 506
Whitford v. N.S. Tramways Co. (N.S.) 531
Whitlock v. Loney (Sask.) 393, 394
Whitney v. Great Northern Ins. Co... (Can.) 312
Whittington, Davis v. (Ont.) 568
Whittlesea, Leonard v. (Alta.) 168
Whyte v. Henderson (Ont.) 475
Wiarton, Town of, v. Canada Casket Co. (Ont.) 407
Wickson, Peterson v. (Man.) 567
Wilcox & Frost v. Lamarre (Que.) 152
Wilcox, Goodchild v. (Ont.) 594
Wilkerson, Francis v. (B.C.) 43
Willard v. Bloom (Ont.) 616
Willaughan, Walsh v. (Ont.) 576
Williams, Bellamy v. (Ont.) 58
Williams v. Keeler (Man.) 378
Williams v. Local Union of Mine Workers (Alta.) 123
Williams Machinery Co. v. Graham.. (Can.) 42
Williams v. Richards (B.C.) 334
Willis v. People's Dairy (Ont.) 150
Wills, Ryan v. (Ont.) 107
Willson, R. v. (Alta.) 277
Wilson, Babinsky v. (Que.) 49
Wilson v. Bell (N.B.) 609
Wilson, C.N.R. Co. v. (Man.) 379
Wilson, Goose Lake Grain Co. v (Sask.) 267, 442
Wilson v. London Free Press Printing Co. (Ont.) 362
Wilson v. Patterson (Alta.) 36, 521
Wilson, Rur. Mun. of Sherwood v. (Can.) 544
Wimbles v. G.T.P.R. Co. (Ry. Bd.) 487
Windebank, Buscombe v. (B.C.) 5, 614
Winding-up Act, Re, and Austin Hotel Co. (B.C.) 97
Winding-up Act, Re, and Robson Investment Co. (B.C.) 401
Windsor, City of, v. Bell Telephone Co. (Ry. Bd.) 552
Windsor, City of, Sandwich, Windsor and Amherstburg Railway v. (Ont.) 529
Windsor Hotel Co., Johansen v. (Que.) 378
Windsor Security Co., Appelbe v. (Ont.) 409
Winnipeg, City of, Bowles v. (Man.) 423
Winnipeg, City of, Freedman v. (Man.) 284
Winnipeg, City of, Ripstein v. (Man.) 33, 197
Winnipeg, City of, and Winnipeg Elec. R. Co., Clark v. (Man.) 283, 285

Win-Zus.] COLUMN

Winnipeg Electric R. Co. & C.N.R. Co., Bartlett v. (Man.) 73
Winnipeg Electric R. Co., Elliott v. (Can.) 283
Winnipeg Fur Co., Merchants Bank v. (Man.) 55
Winterbottom, Brown v. (Que.) 174
Wisconsin Elec. Co., Pringle v. (Ont.) 475
Wiseman v. Eagle Publishing Co. (Que.) 339
Witherspoon v. Tp. of East Williams.. (Ont.) 419
Witt, Re (Alta.) 541
Wohlk v. Montreal Protective Shoemakers (Que.) 56
Won Foo, Canadian Bank of Commerce v. (Alta.) 98
Wong Joe, R. v. (B.C.) 93, 188
Wong Sing v. Town of Minnedosa.. (Man.) 419
Wood and Hudson's Bay Co., Re ... (Alta.) 189
Wood & McGregor, General Financial Corp. v. (Alta.) 400
Wood v. McMartin (Que.) 460
Wood, Rountree v. (Ont.) 134
Wood v. Sherman (B.C.) 171
Woodman, Gallagher v. (Ont.) 593
Woods, Harmston v., Re (Ont.) 18
Woods v. Opsal (B.C.) 345, 588
Woodstock, City of, Westcott v. (Ont.) 282
Woodstock Concrete Machinery Co., Re (B.C.) 116
Woodstock Electric R.L. & P. Co. v. Dominion Tanneries (N.B.) 36
Woodward & Co. v. Koeford (Man.) 616
World Newspaper Co., Dingle v. (Ont.) 364
World Newspaper, Stone v. (Ont.) 364
Worsley v. C.N.R. Co. (Sask.) 232
Wreford, Rur. Mun. of, Currie v. (Sask.) 474
Wright, Pauss v. (Que.) 507
Wright, Walt v. (Ont.) 151

Yamashita v. Hudson Bay Ins. Co... (B.C.) 207
Yeo v. Farragher (Man.) 365
York Sand and Gravel v. Cowlin & Son (Ont.) 134
Yorkton Gas Co.'s Case, Land Titles Act (Sask.) 353
Yost v. International Securities Co... (Ont.) 579
Young and Glanvilles, Re (Alta.) 525
Young Men's Christian Assoc'n, McLean v. (Alta.) 436
Young, Miller v. (Ont.) 574
Young v. The "Minnie A" (Ex.) 178, 376
Young, Simson v. (Can.) 523, 579
Yukerviez v. G.T.R. Co. (Que.) 390
Yule, Canada Law Book Co. v. (Sask.) 134

Zaiser v. Jesske (Sask.) 499
Zarbok, International Harvester Co. v. (Sask.) 122
Zarkas, The King v. (Sask.) 50
Zurbrick, de Schelking v. (B.C.) 167
Zushing, Brunstetter v. (Alta.) 476

CASES

AFFIRMED, REVERSED OR SPECIALLY CONSIDERED.

Ada-Att.] COLUMN

Adams v. Glen Falls Ins. Co., 31 D.L.R. 166, followed 313
Adolph Lumber Co. v. Meadowcreek Lumber Co., 25 B.C.R. 298, reversed 20
Alberta N.W. Lumber Co. v. Lewis, 27 D.L.R. 722, reversed 578
Albion Motor Express Co. v. City of New Westminster, [1918] 1 W.W. R. 493, affirmed 436
Allan v. Gott, L.R. 7 Ch. 439, distinguished 548
Allen v. The King, 18 Can. Cr. Cas. 1, 44 Can. S.C.R. 331, applied 24
American-Abell Engine and Thresher Co. v. McMillan, 42 Can. S.C.R. 377, followed 483
Anderson v. Bank of British Columbia, 2 Ch. D. 644, applied 204
Anderson v. C.N.R. Co., 35 D.L.R. 473, followed 490
Anderson v. C.N.R. Co., 35 D.L.R. 473, affirmed 490
Anderson v. Johnson, 38 D.L.R. 563, affirmed 371
Andrew v. Griffin, [1918] 1 W.W.R. 274, affirmed 50
Andrews v. C.N.R. Co., [1918] 1 W.W. R. 460, affirmed 342
Appelbe v. Windsor Security Co., 40 O.L.R. 548, reversed 409
Archibald v. The King, 35 D.L.R. 560, affirmed 262
Armishaw v. B.C. Elec. R. Co., 14 D.L. R. 393, followed 444
Arnold & Butler v. Bottomley, [1908] 2 K.B. 151, followed 365
Arnold v. Dominion Trust Co., 35 D.L.R. 145, affirmed 310
Athabasca, Town of v. Shaw [1917] 3 W.W.R. 505, followed 548
Att'y-Gen'l v. London and North Western R. Co., [1892] 3 Ch. 274, followed 465
Att'y-Gen'l v. Ritchie, 26 D.L.R. 51, followed 278
Att'y-Gen'l of Manitoba v. Manitoba License Holders, [1902] A.C. 73, applied 129
Att'y-Gen'l of Ontario v. Att'y-Gen'l of Canada, [1896] A.C. 348, applied 129
Att'y-Gen'l for Ontario v. Railway Passengers' Assn'ce Co., 41 O.L.R. 234, reversed in part 106
Att'y-Gen'l of Straits Settlement v. Wemyss, 13 App. Cas. 192, followed 585

Aug-Bev.] COLUMN

Auger & Sons v. G.T. and C.P.R. Co's, 19 Can. Ry. Cas. 401, followed.... 552
Austerberry v. Corp. of Oldham, 29 Ch. D. 750, distinguished 218
Austin & Nicholson v. Canada Steamship Lines, 14 O.W.N. 191, affirmed 134
Ayr, R. v., 14 Can. Cr. Cas. 210, distinguished 326

Bagshaw v. Buxton Local Board, 1 Ch.D. 220, applied 284
Baines v. Curley, 33 D.L.R. 309, applied 392
Baker v. Bolton, 1 Camp. 493, followed 244
Bamford v. Shuttleworth, 11 Ad. & El. 926, followed 476
Bank of Hamilton v. Hartery, 25 B.C.R. 150, affirmed 355
Bank of Montreal v. Stuart, [1911] A.C. 120, followed 288
Bank of Toronto v. Harrell, 31 D.L.R. 440, reversed 264, 559
Banks, R. v., 1 Can. Cr. Cas. 370, followed 94
Barber v. Mackrell, 40 W.R. 618, distinguished 55
Barnett v. Eastman, 67 L.J.Q.B. 517, followed 267
Barr, R. v., 11 Can. Cr. Cas. 1, applied 276
Barron v. Kelly, 37 D.L.R. 8, reversed. 578
Basil v. Spratt, 13 O.W.N. 249, varied 56
Baskerville, R. v., [1916] 2 K.B. 658, applied 15
Baudains v. Richardson, [1906] A.C. 169, followed 593
Beamish v. Richardson, 16 D.L.R. 855, applied 69
Bell Bros. v. Hudson's Bay Ins. Co., 44 Can. S.C.R. 419, followed 312
Bell Telephone Co. v. Belleville Electric Light Co., 12 O.R. 571, followed.. 284
Bell Telephone Co. v. Falkirk Telephone Co., 20 Can. Ry. Cas. 256, followed 551
Bellamy v. Debenham, [1891] 1 Ch. 412, followed 576
Bellamy v. Williams, 12 O.W.N. 232, affirmed 58
Bénard v. Hingston, 32 D.L.R. 651, affirmed 351
Berlin, City of, and County Judge of Waterloo, Re, 33 O.L.R. 73, followed 172
Berlin v. Grange, 1 E. & A. 279, distinguished 524
Beverley, Mayor of, v. Att'y-Gen'l, 6 H.L.C. 310, followed 599

Bin-Bur.] COLUMN

Bing Kee v. Yick Chong, 43 Can. S.C.R. 334, followed 403
Blair, Re, 23 N.S.R. 225, followed ... 277
Blue v. Red Mountain R. Co., [1909] A.C. 361, followed 440
Blythe, R. v., 15 Can. Cr. Cas. 224, applied 24
Board v. Board, 41 D.L.R. 286, not followed 210
Bonanza Creek Gold Mining Co. v. The King, 26 D.L.R. 273, distinguished 105
Borin, R. v., 15 D.L.R. 737, applied.... 322
Boston Law Book Co. v. Canada Law Book Co., 43 O.L.R. 13, affirmed 14, 453
Bouchard v. Sorgius, 26 Que. K.B. 242, reversed 16
Boulter-Waugh v. Phillips, 42 D.L.R. 548, reversed 406
Bow Valley, Mun. of, v. McLean, 26 D.L.R. 716, distinguished 549
Bow Valley, Mun. of, v. McLean, 26 D.L.R. 716, followed 546
Boyd v. Larson, 42 D.L.R. 516, affirmed 442
Boyd v. South Winnipeg [1917] 2 W. W.R. 489, applied 146
Bradley v. Waterhouse, 3 C. & P. 318, distinguished 76
Brady, R. v., 10 Que. S.C. 539, applied 266
Brand v. Green, 13 Man. L.R. 101, applied 616
Brandt v. Dunlop Rubber Co., [1905] A.C. 454, followed 451
Bratts Lake, Rur. Mun. of, v. Hudson's Bay Co., 11 S.L.R. 357, affirmed 182, 539 541
Brereton v. Day, [1895] 1 I.R. 518, followed 245
Brickles v. Snell, 30 D.L.R. 31, distinguished 576
Brickles v. Snell, 30 D.L.R. 31, followed 570
Bridgman v. Hepburn, 42 Can. S.C.R. 228, distinguished 475
B.C. News Co. v. Express Freight Traffic Ass'n, 13 Can. Ry. Cas. 176, followed 86
B.C. Pacific Coast Cities v. C.P.R. Co., 7 Can. Ry. Cas. 125, followed ... 79
B.C. Sugar Refining Co. v. C.P.R. Co., 10 Can. Ry. Cas. 169 followed.... 84
Brodie v. Chipman, 41 O.L.R. 281, reversed 595
Brohm v. B.C. Mills Trading Co., 7 B.C.R. 123, not followed 483
Brousseau v. The King, 26 Que. K.B. 164, affirmed 185
Brownsberger v. Harvey, 2 S.L.R. 481, followed 504
Brunet v. The King, 27 Que. K.B. 481, affirmed 179, 234
Buck v. The King, 35 D.L.R. 55, reversed 257
Buist v. McCombe, 8 A.R. (Ont.) 598, distinguished 10
Bull v. Smith, 84 L.T.R. 835, followed 245
Bulletin Co. v. Sheppard, 27 D.L.R. 562, reversed 363

Bur-Cap.] COLUMN

Burchell v. Gowrie and Blockhouse Collieries, [1910] A.C. 614, applied 476
Burford Coal Co. v. McPherson, 14 O.W.N. 283, affirmed 151
Burkett v. Ott, 12 O.W.N. 309, affirmed 134
Burnard v. Wainwright, 19 L.J.Q.B. 423, distinguished 33
Butterworth and City of Ottawa, Re, 14 O.W.N. 277, affirmed 414
Buxton v. Baughan, 6 Car. & P. 674, followed 365

Calgary, City of, v. Canadian Western Natural Gas Co., 33 D.L.R. 385, affirmed 421
Calgary, City of, v. Canadian Western Natural Gas Co., 40 D.L.R. 201, distinguished 140
Calgary, City of, v. Canadian Western Natural Gas Co, 25 D.L.R. 807, reversed 421
Calgary, City of, v. Dominion Radiator Co., 35 D.L.R. 410, reversed 392
Cameron v. Church of Christ, 40 O.L.R. 567, reversed 595
Canada Bonded Att'y v. Leonard, 12 O.W.N. 388, varied 25, 107
Canada Bonded Attorney v. Leonard-Parmiter, 12 O.W.N. 388, varied.. 376
Canada Foundry Co. v. Edmonton Portland Cement, 32 D.L.R. 114; 25 D. L.R. 683, affirmed 160, 198
Canada National Fire Ins. Co. v. Hutchings, 33 D.L.R. 752, affirmed 110
Canada Woollen Mills, Re, 9 O.L.R. 367, disapproved 563
Canadian Canning Co. v. Fagan, 12 B.C.R. 23, followed 546
Canadian Collieries v. Dixon, 36 D.L.R. 388, affirmed 378
Canadian Fairbanks Co. v. Johnston, 18 Man. L.R. 589, followed 569
Canadian General Securities Co. v. George, 13 O.W.N. 355, reversed.. 141
Canadian Gossard Co. v. Dominion Corset Co., 14 O.W.N. 164, affirmed.. 555
Canadian Lumbermen's Ass'n v. G.T. and C.P.R. Co's, 10 Can. Ry. Cas. 306, followed 84
Canadian Mt'ge Invest. Co. v. Cameron, 33 D.L.R. 792, reversed 318
Canadian Northern Pacific R. Co. v. New Westminster Corp., 36 D.L.R. 505, applied 541
Canadian Oil Co. v. G.T., C.P.R. and C.N.R. Cos., 12 Can. Ry. Cas. 350, followed 84
Canadian Pacific R. Co. v. City of Winnipeg, 30 Can. S.C.R. 558, applied. 541
Canadian Pacific R. Co. v. Nelson, 11 Can. Ry. Cas. 400, followed 82
Canadian Pacific R. Co. v. S.S. "Storstad," 34 D.L.R. 1, varied 6
Canadian Pacific R. Co. v. Walker, 40 D.L.R. 547, affirmed 489
Canadian Port Huron Co. v. Fairchild, 3 S.L.R. 228, followed 502
Capital Fire Ass'nce Ass'n, 24 Ch.D. 408, followed 119

Car-Cro.] COLUMN

Carr v. Berg, 38 D.L.R. 176, affirmed. 153
Carr v. Berg, [1917] 2 W.W.R. 94, affirmed 140
Cartwright v. City of Toronto, 13 D.L.R. 604, followed 543
Chalmers v. Machray, 26 D.L.R. 529, affirmed 70
Champion & White v. City of Vancouver, 31 D.L.R. 22, reversed ... 584
Chandler v. City of Vancouver, [1918] 3 W.W.R. 53, affirmed 415
Charleson Assessment, Re, 22 D.L.R. 240, applied 544
Charleson Assessment, Re, 22 D.L.R. 240, followed 373
Cheeseman v. C.P.R. Co., 40 D.L.R. 437, reversed 25
Chew Deb, R. v., 9 D.L.R. 266, distinguished 328
Christie v. Alberta Rolling Mills Co., 38 D.L.R. 488, reversed 110
Clark v. Hepworth, 34 D.L.R. 177, affirmed 474
Clarke v. Army and Navy Co-operative Society, [1903] 1 K.B. 155, distinguished 506
Clarkson v. Bonner-Worth, 14 O.W.N. 272, affirmed 41
Clarkson v. Dominion Bank, 37 O.L.R. 591, affirmed 53, 54
Clement v. Northern Navigation Co., 13 O.W.N. 22, reversed 435
Clinton Thresher Co., Re, 15 O.W.R. 318, followed 118
Clive School Dist. v. Northern Crown Bank, 34 D.L.R. 16, followed... 542
Cochrane v. Moore, 25 Q.B.D. 57, followed 271
Cockerline and Guelph and Goderich R. Co., Re, 5 Can. Ry. Cas. 313, followed 487
Coghlan v. Cumberland, [1898] 1 Ch. 704, followed 25
Comfort v. Brown, 10 Ch.D. 113, applied 603
Commissioner of Police v. Donovan, [1903] 1 K.B. 895, followed 229
Common v. McArthur, 29 Can. S.C.R. 239, followed 112
Cooke v. Midland G.W.R. Co, [1909] AC. 229, applied 11
Cornea v. National Paving and Construction Co., 26 D.L.R. 402, followed 381
Cowan v. Ferguson, 14 O.W.N. 303, affirmed 299
Coyne, R. v., 28 Can. Cr. Cas. 428, affirmed 370
Crawford v. Bathurst Land and Development Co., 37 O.L.R. 611, affirmed 106, 111
Crawford v. Tilden, 14 O.L.R. 572, followed 392
Credit Co. v. Pott, 6 Q.B.D. 295, distinguished 55
Crooks, R. v., 4 S.L.R. 335, followed.. 190

Cro-Don.] COLUMN

Crow's Nest Pass Coal Co. v. C.P.R. Co., 8 Can. Ry. Cas. 33, followed 79, 85, 86
Cunard v. The King, 43 Can. S.C.R. 88, followed 588
Cunningham v. Kelly, 13 O.W.N. 342, reversed 403
Currie v. Harris Lithographing Co., 40 O.L.R. 290, reversed 524, 525
Currie v. Rur. Mun. of Wreford, 10 S.L.R. 117, reversed 475
Curry v. Girardot, 7 O.W.N. 642, affirmed 408
Cushing Sulphite Fibre Co. v. Cushing, 37 Can. S.C.R. 173, followed ... 114
Cyr, R. v., 12 A.L.R. 320, affirmed 343, 535 506

Davey v. Christoff, 28 D.L.R. 417, not followed 346
Davis, R. v., 7 D.L.R. 608, followed.... 536
Davis v. Tp. of Usborne, 28 D.L.R. 397, explained 282
Davy, R. v., 4 Can. Cr. Cas. 28, applied 535
De Beauvoir v. DeBeauvoir, 3 H.L.C. 524, applied 603
Deering, Re, 24 D.L.R. 818, applied.. 257
Delisle, R. v., 5 Can. Cr. Cas. 210, distinguished 258
Delong v. Mumford, 25 Gr. 586, followed 593
Dempsey v. Lawson, 2 P.D. 98, followed 591
Derry v. Peek, 14 App. Cas. 337, followed 264, 579
Desormeaux v. Ste. Thérèse, 43 Can. S.C.R. 82, followed 16
Devall v. Gorman, 42 D.L.R. 573, reversed 499
Diamond v. Western Realty Ltd., 12 O.W.N. 226, affirmed 576
Dick v. East Coast R. Co., 3 Dig. Eng. Case Law 2213, distinguished 196
Dingle v. World Newspaper Co., 14 O. W.N. 200, affirmed 364
Dingle v. World Newspaper Co., 43 D. L.R. 463, reversed 364
Dinsmore v. Philip, [1918] 1 W.W.R. 405, reversed 228, 472
Dominion Chain Co. v. McKinnon Chain Co., 38 D.L.R. 345, affirmed. 457
Dominion Creosoting Co. v. Nickson, 35 D.L.R. 272, affirmed 104
Dominion Millers' Ass'n, v. G.T. and C.P.R. Co's., 12 Can. Ry. Cas. 363, followed 82
Dominion Sugar Co. v. Canadian Freight Ass'n, 14 Can. Ry. Cas. 188, followed 80
Dominion Trust Co. and Boyce, Re, 25 B.C.R. 214, affirmed 115
Dominion Trust Co. v. N.Y. Life Ins. Co., 32 D.L.R. 33, affirmed.. 5, 26, 314
Doner v. Western Canada Flour Mills Co., 12 O.W.N. 301, reversed 157
Doner v. Western Canada Flour Mills, 41 D.L.R. 476, followed 156

Doo-Far.]	COLUMN
Doolittle & Wilcox v. G.T. and C.P.R. Co's., 8 Can. Ry. Cas. 10, distinguished	86
Doolittle & Wilcox v. G.T. and C.P.R. Cos., 8 Can. Ry. Cas. 10, followed	80
Doucet, Ex parte, 24 Can. Cr. Cas. 347, followed	93
Douglas v. Bury, 14 O.W.N. 241, affirmed	135
Douglas v. McKay, 40 D.L.R. 314, reversed	351
Douglas v. Mutual Life Ass'nce Co., 39 D.L.R. 601, reversed	407
Drapeau v. Recorder's Court, 52 Que. S.C. 505, reversed	415
Duchaine v. Matamajaw Salmon Club, 27 Que. K.B. 196, reversed	220
Dufresne v. Dufresne, 19 Que. P.R. 260, affirmed	581
Dunlop Pneumatic Tyre Co. v. New Garage Co., [1915] A.C. 79, followed	144
Duplessis v. Edmonton Portland Cement, 28 D.L.R. 748, affirmed	62
Dussault and Pageau v. The King, 39 D.L.R. 76, affirmed	145
Dyson v. Att'y-Gen'l, [1911] 1 K.B. 410, [1912] 1 Ch. 158, followed	465
Eakins v. Town of Shaunavon, 11 S.L. R. 310, affirmed	281
East v. Harty, 12 O.W.N. 413, affirmed	288
Eastview Public School Board v. Tp. of Gloucester, 12 O.W.N. 372, reversed	515
Eaton v. Eaton, L.R. 2 P. & D. 51, distinguished	212
Eberts v. The King, 7 D.L.R. 538, applied	286
Eberts v. The King, 7 D.L.R. 550, distinguished	24
Edmonton Cloverbar Sand Co. v. G.T. P.R. Co., 17 Can. Ry. Cas. 95, followed	84
Edmonton Mortgage Co. v. Gross, 3 A. L.R. 500, distinguished	238
Egbert v. Northern Crown Bank, 33 D. L.R. 367, affirmed	273
Elliott v. Winnipeg Electric R. Co., 38 D.L.R. 201, followed	283
Elliott v. Winnipeg Electric R. Co., 38 D.L.R. 201, reversed	283
Emery, R. v., 33 D.L.R. 556, approved	92
Emmerson v. Maddison, [1906] A.C. 569, distinguished	7
Empey v. Fick, 13 O.L.R. 178, 15 O.L.R. 19, followed	134
Ernesttown Rural Telephone Co. v. Bell Telephone Co., 18 Can. Ry. Cas. 325, followed	551
Fafard v. City of Quebec, 35 D.L.R. 661, affirmed	424
Fairweather v. McCullough, 14 O.W.N. 175, affirmed	133
Fargey v. Grand Junction R. Co., 4 O.R. 232, followed	485

Far-Ger.]	COLUMN
Farhall v. Farhall, L.R. 7 Ch. 123, followed	240
Farmers' Advocate v. Master Builders, 31 D.L.R. 558, reversed	144
Fashion Shop Co., Re, 21 D.L.R. 478, followed	118
Faulkner v. The King, [1905] 2 K.B. 76, distinguished	330
Faulkners, Re, 12 O.W.N. 50, affirmed	500
Faye v. Roumegous, 13 O.W.N. 251, varied	457
Fergus, Village of, v. G.T.R. Co., 18 Can. Ry. Cas. 42, distinguished	85
Ferrara v. National Surety Co., 27 D. L.R. 518, reversed	478
Ferris v. C.N.R., 15 Man. L.R. 134, followed	75
Ferris v. Edwards, 14 O.W.N. 311, affirmed	523
Fisheries case, [1898] A.C. 700, followed	278
Fogde v. Parsenau, 10 S.L.R. 423, followed	10
Forget v. Baxter, [1900] A.C. 467, followed	158
Forrer v. Nash, 35 Beav. 167, 55 E.R. 858, followed	576
Forster v. Medicine Hat, 17 D.L.R. 391, followed	422
Forsyth v. Walpole Farmers' Mutual Fire Ass'nce Co., 14 O.W.N. 114, affirmed	306
Fox v. Patrick, 13 O.W.N. 400, affirmed	62
Fox, R. v., 10 Cox C.C. 502, distinguished	330
Francis v. Wilkerson, 25 B.C.R., 132, affirmed	43
Franco-Canadian Mtge. Co. v. Greig and Thirlaway, 29 D.L.R. 260, affirmed	472
Franklin v. Reardon, 35 D.L.R. 380, affirmed	134
Fraser v. Fraserville, 34 D.L.R. 211, followed	33
Fraser v. Mutchmor, 8 O.L.R. 613, followed	573
Freeman, Re, [1898] 1 Ch. 28, followed	245
Friendly v. Carter, 9 P.R. (Ont.) 41, approved	556
Frind v. Frind, 12 O.W.N. 245, affirmed	211
Furness, Withy & Co. v. Ahlin, 35 D. L.R. 150, affirmed	589
Gagnon v. Lemay, 27 Que. K.B. 59, affirmed	579
Gas Light and Coke Co. v. Turner, 6 Bing. N.C. 234, distinguished	588
Gault v. Murray, 21 O.R. 458, followed	300
Gauthier v. The King, 33 D.L.R. 88, affirmed	31
Geall v. Dominion Creosoting Co., 25 D.L.R. 543, affirmed	531
Geddis v. Bann Reservoir, 3 App. Cas. 430, followed	281
George v. Howard, 16 D.L.R. 468, followed	476
Germain v. Clavel, 51 Que. S.C. 165, reversed	596

Ger-Ham.] COLUMN

German v. City of Ottawa, 34 D.L.R. 632, affirmed 436
German v. City of Ottawa, 11 O.W.N. 331, reversed 436
Gerow v. Hughes, 13 O.W.N. 8, reversed 156
Gibb v. Canadian Northern Construction Co., [1918] 1 W.W.R. 575, reversed 137
Gibb v. The King, 27 D.L.R. 262, reversed 250
Gibbon v. Paynton, 4 Burr. 2298, distinguished 76
Ginsberg, Re, 27 Can. Cr. Cas. 447, reversed 610
Giroux, R. v., 30 Can. Cr. Cas. 101, affirmed 188
Gladstone v. Tempest, 2 Curteis, 650, followed 591
Gladwin v. Cummings, Cassels' S.C. Dig. 427, followed 18
Gloag & Miller's Contract, Re, 23 Ch.D. 320, followed 575
Goff, Re, 111 L.T.R. 34, followed 270
Goodchild v. Wilcox, 12 O.W.N. 55, affirmed 594
Gooderham v. City of Toronto, 25 Can. S.C.R. 246, distinguished 488
Gough v. Toronto and York Radial R. Co., 14 O.W.N. 154, affirmed 170
Gouinlock v. Maclean, 14 O.W.N. 142, varied 155
Grace v. Kuebler, 33 D.L.R. 1, affirmed. 568
Graham v. Spettigue, 12 A.R. (Ont.) 261, distinguished 10
Grand Falls, Town of, The King v., 13 D.L.R. 266, followed 515
Grand Trunk and C.P.R. Co's. v. City of Toronto, 11 Can. Ry. Cas. 38, followed 90
Grand Trunk Pacific Coast Steamship Co. v. Victoria-Vancouver Stevedoring Co., 38 D.L.R. 468, affirmed... 140
Grand Trunk Pacific R. Co. v. B.C. Express Co., 38 D.L.R. 29, affirmed .. 585
Grand Trunk Pacific R. Co. v. B.C. Express Co., 27 D.L.R. 497, reversed. 585
Grand Trunk Pacific R. Co. v. Fort William Landowners Co., [1912] A.C. 224, followed 551
Grand Trunk R. Co. v. Mayne, 34 D.L.R. 644, reversed 73
Gratton Separate School v. Regina Public School, 35 D.L.R. 158, affirmed 515
Great West Permanent Loan Co. v. Hutchings, 33 D.L.R. 752, affirmed 110
Greenock Corp. v. Caledonian R. Co., [1917] A.C. 556, followed 587
Guardian Ass'nce Co. v. Garrett, 40 D.L.R. 455, reversed 102
Hadley v. Baxendale, 156 E.R. 145, applied 198
Hagman v. Merchants Bank, 13 A.L.R. 293, applied 543
Hamilton Motor Works v. Browne, 13 O.W.N. 120, reversed 483

Han-Imp.] COLUMN

Haney v. Canadian Northern R. Co., 36 D.L.R. 674, affirmed 485
Hankin v. John Morrow Screw Co., 54 Que. S.C. 208, affirmed 194
Hanley v. T.H.B.R. Co., 11 O.L.R. 91, distinguished 486
Hansen v. Franz, 36 D.L.R. 349, reversed 575
Hardoon v. Bellios, [1901] A.C. 118, applied 243
Harris v. Hickey, 2 D.L.R. 356, followed 372
Harris v. Waterloo Mutual Fire Ins. Co. 10 O.R. 718, followed 313
Harrison v. Harrison, 41 O.L.R. 195, affirmed 213
Hart-Parr Co. v. Wells, 40 D.L.R. 169, affirmed 508
Hart-Parr Co. v. Wells, 11 S.L.R. 132, applied 505
Hassard v. Allen, 15 O.W.N. 16, affirmed 265
Hawes v. Hart, 18 N.S.R. 42, distinguished 323
Hay and Engledue, Re, 14 O.W.N. 90, affirmed 398
Heckman, The King v., 5 Can. Cr. Cas. 242, followed 553
Heckman, R. v., 5 Can. Cr. Cas. 242, considered 6
Helwig v. Siemon, 10 O.W.N. 29, followed 109
Henderson v. Pinto Creek, 33 D.L.R. 599, followed 451
Henry Hope & Sons v. Canada Foundry, 12 O.W.N. 168, affirmed 151
Herron v. Como, 16 D.L.R. 234, distinguished 476
Hetting v. Sneeth, 14 O.W.N. 326, affirmed 473
Hill v. Broadbent, 25 A.R. (Ont.) 159, distinguished 573
Hoehn v. Marshall, 14 O.W.N. 316, reversed 410
Hogan v. Tp. of Tudor, 34 O.L.R. 571, distinguished 469, 525
Hossack v. Shaw, 39 D.L.R. 797, reversed in part 319
Hubbuck & Sons v. Wilkinson Heywood & Clark, [1899] 1 Q.B. 86, followed 465
Hudson Bay Ins. Co. v. Creelman, 37 D.L.R. 199, reversed 106
Huggett v. Miers, [1908] 2 K.B. 278, applied 350
Hughes, Re, 42 O.L.R. 345, reversed 563, 564
Hughes v. Oxenham, [1913] 1 Ch. 254, followed 614
Hughes v. Pump House Hotel Co., [1902] 2 K.B. 190, followed 36
Hughes, R. v., 4 Q.B.D. 614, applied.. 535
Huguenin v. Baseley, 14 Ves. 273, followed 148
Hunt and Bell, Re, 34 O.L.R. 256, followed 539
Imperial Steel & Wire Co. v. G.T.R. Co, 11 Can. Ry. Cas. 395, followed 82

Ing-Kna.] COLUMN

Ingram, Re, 42 O.L.R. 95, followed.... 602
Innis v. Costello, 33 D.L.R. 602, distinguished 575
International Paper Co. v. G.T. and C.N.R. Cos., 15 Can. Ry. Cas. 111, followed 87
J. I. Case Threshing Machine Co. v. Mitten, 11 S.L.R. 238, affirmed .. 505
Jackson, R. v., 12 O.W.N. 191, affirmed 95, 224, 566
Jacobs Asbestos Co. v. Quebec Central R. Co., 19 Can. Ry. Cas. 357, followed 82
James Nelson & Sons v. Nelson Line, [1906] 2 K.B. 217, explained and distinguished 169
Jamieson v. City of Edmonton, 36 D.L.R. 465, followed 283
John Deere Plow Co. v. Wharton, 18 D.L.R. 353, distinguished 524
Johnson & Carey Co. v. C.N.R., 43 O.L.R. 10, reversed 392
Johnson v. Crook, 12 Ch.D. 639, followed 606
Johnson v. Regent Construction Co., 37 D.L.R. 790, reversed 478
Jones v. Great Central R. Co., [1910] A.C. 4, applied 204
Jones & Lyttle v. Mackie, [1917] 3 W.W.R. 1021, reversed 23

Kavanaugh v. Cassidy, 5 O.L.R. 614, distinguished 167
Keefer v. Phœnix Insurance Co., 31 Can. S.C.R. 144, followed 304
Keighley & Co., Re, [1893] 1 Q.B. 405, distinguished 33
Keighley v. Durant, [1901] A.C. 240, followed 144
Kendler v. Bernstock, 22 D.L.R. 475, applied 392
Kerr v. Burns, 9 N.B.R. 604, distinguished 470
Keyes v. Hanington, 13 D.L.R. 139, distinguished 116
Khoo Sit Hoh v. Lim Thean Tong, [1912] A.C. 323, followed 25
Kildonan Investments v. Thompson, 21 D.L.R. 181, affirmed 13
Kilmer v. B. C. Orchard Lands, 10 D.L.R. 172, followed 522, 569
Kilpin v. Ratley, [1892] 1 Q.B. 582, explained and distinguished 271
King, The v. Bowles, 41 D.L.R. 254, affirmed 249
King, The v. Gibb, 27 D.L.R. 262, reversed 250
King, The v. Patrick King, 41 D.L.R. 374, affirmed 197
King, The v. Quebec Gas Co., 42 D.L.R. 61, affirmed 248
Kirby v. Bangs, 27 A.R. (Ont.) 17, followed 606
Kladis v. Pulos, 24 Rev. Leg. 482, motion to quash dismissed 291
Knapp v. Knapp, 12 P.R. 105, distinguished 212

Kno-Mac.] COLUMN

Knox v. Gye, L.R. 5 H.L. 656, applied. 457
Komnick System Sandstone Brick Mach. Co. v. B. C. Pressed Brick, 8 D.L.R. 859, reversed 120
L. I. District 453 v. North Saskatchewan Land Co., [1917] 2 W.W.R. 138, not followed 548
Lake Superior Paper Co. v. Algoma Central & Hudson Bay R. Co., 22 Can. Ry. Cas. 361, followed 85
Land Registry Act and Shaw, Re, 24 D.L.R. 429, followed 353
LaSalle, Mun. of v. C.P.R. and N.Y. Central R. Cos., 20 Can. Ry. Cas. 190, followed 90
Last West Lumber Co. v. Haddad, 25 D.L.R. 529, followed 407
Latham v. Johnson, [1913] 1 K.B. 398, applied 436
Law v. Garrett, 8 Ch.D. 26, followed.. 30
Law and McLean v. Sawyer-Massey, 38 D.L.R. 333, affirmed 475
Lawrence v. Trustees of Beaver Valley School Dist, [1918] 3 W.W.R. 71, reversed 299
Learmont, R. v., 23 N.S.R. 24, distinguished 94
Ledoux Co. v. Canadian Freight Ass'n., 12 Can. Ry. Cas 3, distinguished.. 86
Leduc v. Ward, 20 Q.B.D. 475, followed 76
Lee v. Armstrong, 37 D.L.R. 738, followed 238
Lees v. Morgan, 11 O.W.N. 222, reversed 245
Lemage v. Goodban, L.R. 1 P. 57, followed 591
Leonard v. Kremer, 11 D.L.R. 491, applied 506
Lett v. Gettins, [1918] 2 W.W.R. 881, affirmed 355
Liverpool & London & Globe Ins. Co. v. Kadlac, [1918] 2 W.W.R. 429, affirmed 320
Lloyd v. Lloyd, 19 D.L.R. 502, applied. 213
Loach v. B. C. Electric R. Co., 23 D.L.R. 4, followed 439
London and Lancashire Fire Ins. Co. v. Veltre, 39 D.L.R. 221, affirmed... 552
London Pressed Hinge Co., Re, [1905] 1 Ch. 576, distinguished 108
Love v. Bell Piano Co., 2 A.L.R. 209, not followed 616
Lowery v. Walker, [1911] A. C. 10, followed 431
Lyle v. Richards, L.R. 1 H.L. 222, followed 573
Lynch-Staunton v. Somerville, 43 D.L.R. 736, reversed 172

MacAuley v. Jacobson, 37 N.B.R. 537, distinguished 35
Macdonell v. Keefer, 14 O.W.N. 25, affirmed 408
Mackay v. City of Toronto, 39 O.L.R. 34, affirmed 429
Macleod, Town of, v. Campbell, 41 D.L.R. 357, reversed 545

Mag-Mea.] COLUMN

Magill v. Tp. of Moore, 41 D.L.R. 78, reversed 283
Mah Kong Doon v. Mah Cap Doon, 37 D.L.R. 50, affirmed 456
Maher v. Archambault, 25 Que. K.B. 436, affirmed 454
Mahoney v. City of Guelph, 41 D.L.R. 60, reversed 424
Mailloux, Re, 14 O.W.N. 85, reversed.. 602
Makin v. Att'y Gen'l for N.S.W., [1894] A.C. 57, followed 324
Makowecki v. Yackimyc, 34 D.L.R. 130, applied 589
Maloof v. Bickell, 13 O.W.N. 4, affirmed 150
Manie v. Town of Ford, 14 O.W.N. 83, affirmed 424
Manitoba v. Manitoba License Holders, [1902] A.C. 73, applied 129
Maple Leaf Lumber Co. v. Caldbick, 34 D.L.R. 766, reversed 360
Maple Leaf Milling Co. v. Colonial Ass'nce. Co., 36 D.L.R. 202, followed 313
Martin, R. v. 40 O.L.R. 270, affirmed... 295
McAnn, R. v., 3 Can. Cr. Cas. 110, distinguished 166
McCallum v. Cohoe, 42 O.L.R. 595, reversed 288, 289
McCance v. London and N.W.R. Co., 3 H. & C. 343, distinguished 76
McCord v. Alberta and Great Waterways R. Co., 41 D.L.R. 722, reversed 22, 368, 586
McCord v. Alberta & Great Waterways R. Co., [1918] 3 W.W.R. 622, followed 588
McCullough v. Marsden Estate, [1918] 3 W.W.R. 725, followed 241
McCullough v. Marsden Estate, [1918] 3 W.W.R. 725, affirmed 565
McCutcheon v. Minitonas, 2 D.L.R. 117, followed 546
McDonald v. G. T. R. Co. and City of Montreal, 40 D.L.R. 749, affirmed 377
McGowan v. Hudson's Bay Co., 5 Terr. L.R. 147, followed 541
McHugh v. Union Bank, 10 D.L.R. 562, followed 503
McIlwee v. Foley, 24 B.C.R. 532, referred back for further enquiry by P.C. 23, 195
McKee v. Philip, 38 D.L.R. 731, distinguished 472
McKillop v. Royal Bank, 33 D.L.R. 268, reversed in part 55
McMurrer, R. v., 18 Can. Cr. Cas. 385, approved 35
McNairn v. Goodman, 12 O.W.N. 374, affirmed 265
McNish v. Munro, 25 U.C.C.P. 290, distinguished 573
McPherson v. Niagara Grain and Feed Co., 14 O.W.N. 271, affirmed ... 507
Meadowcreek Lumber Co. v. Adolph Lumber Co., 25 B.C.R. 298, reversed 511

Mee-Nor.] COLUMN

Meeker v. Nicola Valley Lumber Co., 31 D.L.R. 607, affirmed 568
Melvin, R. v. 34 D.L.R. 382, applied.. 93
Menzies v. Bartlett, 15 O.W.N. 8, varied 136
Mercantile Trust Co. v. Campbell, 13 O.W.N. 144, reversed 133
Merchants' Bank v. Bush, 38 D.L.R. 499, reversed 53
Merchants' Bank v. Houston, 9 B.C.R. 158, followed 238
Merchants' Bank v. Thomson, 39 D.L.R. 664, reversed 562
Merritton, Village of v. County of Lincoln, 12 O.W.N. 370, reversed.. 280
Michiels v. Empire Palace, 66 L.T. 132, followed 167
Middleton v. Spicer, 1 Bro.C.C. 201, followed 600
Mignault v. Desjardins, 23 Rev. Leg. 85, affirmed 473
Miller v. Hancock, [1893] 2 Q.B. 177, distinguished 350
Miller, R. v., 25 Can. Cr. Cas. 151, followed 277
Mizon v. Pohoretzky, 12 O.W.N. 167, affirmed 150
Mohr v. Parks, 3 A.L.R. 252, followed. 270
Molling v. Dean, 18 T.L.R. 217, followed 162
Molsons Bank v. Cranston, 14 O.W.N. 345, affirmed 272
Monti v. Barnes, [1901] 1 Q.B. 205, followed 403
Montreal, City of v. Beauvais, 42 Can. S.C.R. 211, followed 413
Montreal, City of v. C.P.R. Co., 18 Can. Ry. Cas. 50, followed 489
Montreal Produce Merchants Ass'n. v. G. T. and C. P. R. Cos., 9 Can. Ry. Cas. 232, followed 84
Montreal Tramways Co. v. Mulhern, 26 Que. K.B. 456, affirmed 530
Morgan, R. v., 5 Can. Cr. Cas. 63, applied 276
Morran v. Railway Passengers Ass'nce. Co., 13 O.W.N. 358, affirmed 315
Morris v. Baron, [1918] A.C. 1, followed 109
Municipal Clauses Act and Dunsmuir, Re, 8 B.C.R. 361, distinguished ... 544
Murphy & Gould v. The King, 27 D.L.R. 405, reversed 398

Nelson v. C.P.R. Co., 35 D.L.R. 318, reversed 486
Nevills v. Ballard, 28 O.R. 588, followed 537
Newton v. Bergman, 13 Man. L.R. 563, distinguished 45
Nichols v. McNeil, 50 N.S.R. 67, affirmed 291
Nickle v. Harris, 3 S.L.R. 200, followed 58
Niemann v. Niemann, 43 Ch.D. 198, applied 336
North Shore R. Co. v. Pion, 14 App. Cas. 612, followed 585
Northern Shirt Co. v. Clark, 38 D.L.R. 1, affirmed 458

Oak-Ply.] COLUMN

Oakville, Town of v. Cranston, 10 O. W.N. 315, 10 O.W.N. 175, affirmed 285
Oesterreichische Export A. G. v. British Indemnity Ins. Co., [1914] 2 K.B. 747, distinguished 453
Ogilvie Flour Mills Co. v. Morrow Cereal Co., 39 D.L.R. 463, affirmed 23
O'Grady v. Lecomte, 40 D.L.R. 378, affirmed 58
Okell v. Morris, 9 B.C.R. 153, applied.. 120
Okura & Co. v. Forsbacka Jernverks Aktiebolag, [1914] 1 K.B. 715, distinguished 617
Olivier v. Jolin, 36 D.L.R. 729, followed 16
Ontario Fruit Growers' Ass'n. v. C.P.R. Co., 3 Can. Ry. Cas. 430, distinguished and followed 81
Oshawa, Town of v. Ontario Asphalt Block Paving Co., 15 O.W.N. 11, affirmed 145
Ostrander Estate, Re, 8 W.W.R. 367, followed 122
Ottawa Separate School Trustees v. Ottawa Corp., 32 D.L.R. 10, distinguished 127
Ottawa Separate School Trustees v. Quebec Bank, 41 O.L.R. 594, reversed 129
Ottawa Y.M.C.A. v. City of Ottawa, 29 O.L.R. 574, applied 30
Otto v. Roger, 35 D.L.R. 339, affirmed. 216
Owen Sound Wire Fence v. U. S. Steel Products, 13 O.W.N. 104, varied.. 143

Pacific Coast Syndicate, Re, [1913] 2 Ch. 26, followed 117
Palmason v. Kjernested, 36 D.L.R. 448, affirmed 408, 472
Paré v. Carette Co., 53 Que. S.C. 306, affirmed 231
Paul, Baptiste, Re, 7 D.L.R. 25, followed 536
Pavitt v. North Metropolitan Tramways Co., 48 L.T. 730, applied ... 204
Payne v. The King, [1902] A.C. 552, followed 549
Peebles v. Johnson, 1 S.L.R. 523, followed 502
Penberthy v. Corner, 14 O.W.N. 275, affirmed 156
Perkins Electric Co. v. Electric Specialty Co., 14 O.W.N. 190, affirmed 151
Perry v. Perry, 37 D.L.R. 89, affirmed 24, 603
Peterson Lake Silver Cobalt Mining Co. v. Dominion Reduction Co., 41 O.L.R. 182, affirmed 398
Pilkey v. Pyne, 14 O.W.N. 308, reversed 567
Pim v. Municipal Council of Ontario, 9 U.C.C.P. 304, distinguished 429
Pion v. School Comm'rs of St. Stanislas, 19 Que. P R. 3, affirmed 466
Plymouth, Devonport & South Western Junction R. Co. v., G. W. R. Co., 10 Ry. & Ca. Tr. Cas. 68, followed.. 82

Pop-Rog.] COLUMN

Pope v. Royal Bank, 11 A.L.R. 68, affirmed 111
Poulin and Village of L'Orignal, Re, 42 O.L.R. 6, reversed 420
Power v. The King, 34 D.L.R. 257, reversed 254
Prest-o-Lite Co. v. People's Gas Supply Co., 16 Can. Ex. 386, affirmed ... 554
Preston v. Luck, 27 Ch.D. 497, applied .413
Prince Albert, City of v. Vachon, 27 D. L.R. 216, approved 197
Public Works Com. of v. Logan, [1903] A.C. 355, followed 127

Quebec, City of v. Lampson, 49 Que. S.C. 307, reversed 138, 182
Queensland Investment Co. v. O'Connell, 12 T.L.R. 502, followed 158
Quesnel Forks Mining Co. v. Ward, 42 D.L.R. 476, distinguished 482

Ramsay v. Margrett, [1894] 2 Q.B. 18, explained and distinguished 271
Randall v. Calgary, 9 W.W.R. 1508, distinguished 422
Rat Portage Lumber Co. v. Harty, 12 O.W.N. 211, affirmed 267
Reach, A. J., Co. v. Crosland, 43 O.L.R. 209, affirmed 219, 539
Regina Bd. of Trade v. C. P. and C. N. R. Co., 11 Can. Ry. Cas. 380, followed 79
Regina, City of v. McCarthy, 32 D.L.R. 741, affirmed 515
Regina, City of v. Western Trust Co., 30 D.L.R. 548, 24 D.L.R. 26, affirmed 383
Reimer v. Rosen, [1918] 1 W.W.R. 425, varied 144
Reischer v. Borwick, [1894] 2 Q.B. 548, followed 314
Reynolds v. Presteign Urban Dist. 65 L.J.Q.B. 400, applied 284
Riddle v. Pittsburgh & Lake Erie R. Co., 1 I.C.C.R. 374, followed 82
Riesbech v. Creighton, 12 D.L.R. 363, followed 515
Riley, R. v., 30 D.L.R. 584, distinguished 266
Roach v. McLachlan, 19 A.R. (Ont.) 496, distinguished 238
Robb v. Merchants Casualty Co., 41 D.L.R. 21 306
Robert v. Montreal Trust Co., 36 D. L.R. 516, affirmed 113
Robin v. Pesant, 27 Que. K.B. 88, reversed 290
Robinson v. Robinson, 14 O.W.N. 199, reversed 289
Robinson v. Robinson, 2 Lee Eccl. R. 593, followed 213
Roddam v. Morley, 37 Ch.D. 651, followed 368
Rogers v. Calgary Brewing & Malting Co., 34 D.L.R. 252, reversed 61
Rogers v. General Accident Fire and Life Ass'nce. Co., 13 O.W.N. 175, affirmed 308

Rol-Smi.] COLUMN

Rollefson v. Olson, 21 D.L.R. 671, distinguished 354
Rosborough v. Trustees of St. Andrew's Church, 30 D.L.R. 391, affirmed... 607
Ross v. Scottish Union and National Ins. Co., 39 D.L.R. 528, affirmed. 306
Roth v. South Easthope Farmers' Mutual Fire Ins. Co., 41 O.L.R. 52, varied 315, 614
Rowan v. Toronto R. Co., 14 O.W.N. 173, affirmed 559
Rowe v. G.T.R. Co., 16 U.C.C.P. 500, followed 148
Ruddy v. Toronto Eastern R. Co., 21 Can. Ry. Cas. 377, applied 24
Russell v. Russell, 12 A.L.R. 111, reversed 355
Rynd v. Tp. of Blanshard, 15 O.W.N. 150, affirmed 425

St. Lawrence Flour Mills Co. v. Stewart, 26 Que. K.B. 476, affirmed.. 378
St. Pierre, Town of v. G.T.R. Co., 13 Can. Ry. Cas. 1, followed 489
St. Prosper, Parish of v. Rodrique, 37 D.L.R. 321, affirmed 418
Saunby v. City of London, [1906] A.C. 110, followed 584
Sawyer v. Pringle, 18 A.R. (Ont.) 218, followed 502
Sawyer-Massey Co. v. Ritchie, 43 Can. S.C.R. 614, applied 506
Schaffenius v. Goldberg, [1916] 1 K.B. 284, followed 9
Schell v. McCallum, 38 D.L.R. 133, affirmed 273
Schneider v. Norris, 2 M. & S. 286, followed 137
Schofield v. Emerson Brantingham Implement Co., 38 D.L.R. 528, reversed 504
Scown v. Herald Publishing Co., 38 D.L.R. 43, affirmed 362
Seagram v. Kemish, 13 O.W.N. 321, affirmed 512
Security Trust Co. v. Stewart, 39 D. L.R. 801, reversed 97
Segsworth v. Anderson, 21 A.R. (Ont.) 242, 24 Can. S.C.R. 669, distinguished 563
Sewell v. B. C. Towing Co., 9 Can. S.C.R. 527, applied 137
Shepard v. British Dom. Gen'l. Ins. Co., 10 S.L.R. 421, reversed 316
Shepard v. British Dom. Gen. Ins. Co., 11 S.L.R. 259, followed 312
Sherwood, Bur. Mun. of, v. Wilson, 31 D.L.R. 795, 30 D.L.R. 539, affirmed 544
Simpson v. Local Board of Health of Belleville, 12 O.W.N. 241, affirmed 431
Simson v. Young, 33 D.L.R. 220, reversed 523, 579
Smiles v. Edmonton School Dist. 41 D.L.R. 400, reversed 430
Smith v. City of Regina, 34 D.L.R. 238, affirmed 439
Smith v. Curry, 36 D.L.R. 400, varied.. 218

Smi-Tay.] COLUMN

Smith v. Day, 21 Ch.D 421, followed... 300
Smith v. Hunt, 5 O.L.R. 97, distinguished 18
Smith v. Ontario and Minnesota Power Co., 42 O.L.R. 167, varied 587
Smith & Co. v. Bedouin Steam Navigation Co., [1896] A.C. 70, followed.. 76
Snipe Lake, Rur. Mun. of v. Martin, [1918] 1 W.W.R. 841, not followed 539
Snitzler Advertising Co. v. Dupuis, 14 O.W.N. 78, affirmed 2
Soper v. City of Windsor, 32 O.L.R. 352, followed 539
Soules v. Soules, 3 Gr. 113, followed.. 213
Southport and West Lancashire Banking Co. v. Thompson, 37 Ch.D. 64, followed 403
Spackman v. Evans, L.R. 3 H.L. 171, followed 112
Sparks v. Clement, 40 O.L.R. 487, reversed 137
Sproule, Re, 12 Can. S.C.R. 140, applied 277
Stack v. T. Eaton Co., 4 O.L.R. 335, followed 403
Stahl v. Miller, 37 D.L.R. 514, reversed 472
Standard Fire Ins. Co., Re, 12 Can. S.C. R. 644, followed 110
Standard Reliance M'tge. Co. v. Stubbs, 32 D.L.R. 57, reversed 318
Stark v. Somerville, 40 O.L.R. 374, affirmed 69
Steedman v. Drinkle, 25 D.L.R. 420, distinguished 569, 576
Stevens, R. v., 102 E.R. 1063, distinguished 263
Stevens v. Theatres Limited, [1903] 1 Ch. 857, distinguished 410
Stokes-Stephens Oil Co. v. McNaught, 34 D.L.R. 375, affirmed 30
Stothers v. Toronto General Trusts Corp., 13 O.W.N. 290, affirmed ... 66
Straus Land Corp. v. International Hotel Windsor, 15 O.W.N. 10, reversed in part 347
Strong v. Crown Fire Ins. Co., 13 D.L. R. 686, followed 312
Sturgeon Falls v. Imperial Land Co., 7 D.L.R. 352, distinguished 548
Sumner v. McIntosh, 35 D.L.R. 336, affirmed 521
Superior Copper Co. v. Perry, 40 O. L.R. 467, reversed in part 615
Sutherland v. Rur. Mun. of Spruce Grove, [1918] 3 W.W.R. 152, varied 356, 547, 549
Swaizie v. Swaizie, 31 O.R. 324, followed 310

Taggart, Re, 39 D.L.R. 559, affirmed.. 297
Tansley, R. v., 38 D.L.R. 339, affirmed 229
Tarrabain v. Ferring, 35 D.L.R. 632, affirmed 346
Taylor v. Bank of New South Wales, 11 App. Cas. 596, followed 265
Taylor v. Davies, 39 O.L.R. 205, reversed 42, 563

CASES AFFIRMED, REVERSED, ETC.

COLUMN

an.]
gram Printing Co. v. Knott, 32 D. L.R. 409, affirmed 363
graph Tolls, Re, 20 Can. Ry. Cas. 1, followed 550
niskaming Telephone Co. v. Town of Cobalt, 43 D.L.R. 724, reversed. ... 550
hompson v. Thompson, 4 O.L.R. 442, followed 233
horn v. London Corp., 1 App. Cas. 120, distinguished 146
Thorne v. Kerr, 2 K. & J. 54, followed 243
Tinkess v. Bell Telephone Co., 20 Can. Ry. Cas. 249, followed 350
Titchmarsh, R. v. 32 O.L.R. 569, applied 95
Tomlinson v. Hill, 5 Gr. 231, followed. 539
Tompkins, Ex parte, 12 Can. Cr. Cas. 552, distinguished 326
Toronto, City of v. Morson, 11 O.W.N. 195, affirmed 182, 540
Toronto, City of v. Russell, [1908] A. C. 493, followed 543
Toronto, City of v. Toronto R. Co., 42 O.L.R. 603, affirmed 529
Toronto General Trusts Co. v. The King, 32 D.L.R. 534, affirmed 549
Toronto and Grosvenor St. Presbyterian Church Trustees, Re, 40 O.L.R. 550, affirmed 248
Toronto and Hamilton Highway v. Coleman, 14 O.W.N. 317, varied .. 163
Toronto R. Co. v. The King, 25 D.L.R. 386, reversed 14, 125, 446
Toronto R. Co. v. Toronto Corporation, [1904] A.C. 800, distinguished... 544
Trevor v. Whitworth, 12 App. Cas. 409, followed 112
Trusts and Guarantee Co. v. Grand Valley R. Co., 15 O.W.N. 23, varied.. 493
Turner v. Wright, 2 De G.F. & J. 234, applied 547
Tyrell v. Tyrell, 13 O.W.N. 105, reversed in part 242

Union Bank v. Makepeace, 38 D.L.R. 361, reversed 265, 272
Union Natural Gas Co. v. Chatham Gas Co., 38 D.L.R. 753, reversed 141
Universal Land Co. v. Jackson, 33 D.L. R. 764, distinguished 575
Upper Canada College v. City of Toronto, 32 D.L.R. 246, affirmed ... 542
Urquhart v. Strathcona Horse Repository, 2 A.L.R. 183, differed from 506

Van Diemen's Land Co. v. Marine Bd. of Table Cape, [1906] A.C. 92, followed 373
Vancouver Fleet, R. v., 38 D.L.R. 392, affirmed 328, 330
Vancouver Grutten v. Foxwell, [1897] A. C. 658, followed 603
Vancouver v. Cummings, 2 D.L.R. 253, followed 283
Vancouver Lumber Co. v. The King, 41 D.L.R. 617, affirmed 481

Van-Wey.]
Vane v. Barnard, 2 Vern. 738, applied. 547
Vanstone v. Scott, 1 A.L.R. 462, followed 502
Vanzant v. Coates, 37 D.L.R. 471, 39 D.L.R. 485, followed 148, 593
Vezina v. Lafortune 25 Que. K.B. 544, reversed 333
Victoria, City of v. Dist. of Oak Bay, 34 D.L.R. 734, affirmed 514
Victoria, City of v. Mackay, 39 D.L.R. 450, reversed 527
Voight v. Orth, 5 O.L.R. 443, distinguished 18
Vopni v. Bell, 8 W.L.R. 205, followed.. 287

Wade, Re, 2 A.L.R. 171, followed 112
Wade v. James, 15 O.W.N. 77, reversed 40
Wake v. Harrop, 6 H. & N. 768, followed 474
Walker v. Gourney-Tilden Co., 19 P.R. 12, explained and distinguished .. 169
Walker v. Walker, 35 D.L.R. 207, reversed 209
Walker v. Walker, 39 D.L.R. 731, followed 209
Walker v. Walker, 39 D.L.R. 731, not followed 210
Walmsley v. Hyatt, 12 O.W.N. 412, affirmed 472
Walsh v. International Bridge and Terminal Co., 13 O.W.N. 411, reversed 437
Walt v. Wright, 14 O.W.N. 240, affirmed. 151
Ward v. Hobbs, 4 App. Cas. 12, followed 129, 505
Warwick Tyre Co. v. New Motor & General Rubber Co., [1910] 1 Ch. 248, followed 555
Waterous Engine Works Co. v. Town of Palmerstone, 21 Can. S.C.R. 556, followed 429
Waterpark v. Fennell, 7 H.L.C. 650, followed 573
Watts v. Watts, [1908] A.C. 573, followed 209
Weldon v. DeBathe, 14 Q.B.D. 339, applied 364
Wells v. Williams (1697), 1 Salk. 46, followed 9
Wenborn, Re, [1905] 1 Ch. 413, followed 117
Wentworth, County of v. Hamilton Radial Elec. R. Co., 12 O.W.N. 379, affirmed 334, 529
Westcott v. City of Woodstock, 13 O. W.N. 480, affirmed 282
Western Tolls, Re, 17 Can. Ry. Cas. 123, followed 82
Weston, Village of, v. G.T. and C.P.R Cos., 7 Can. Ry. Cas. 79, followed.. 469
Wetaskiwin, City of v. C. & E. Townsites, [1918] 3 W.W.R 145, affirmed 412, 544
Weyburn Townsite Co. v. Hossberger, 43 O.L.R. 451, reversed 103

Whi-Wil.] COLUMN

White v. Victoria Lumber Co., [1910] A.C. 606, followed 440
Whitney v. Great Northern Ins. Co., 32 D.L.R. 756, affirmed 312
Wicher v. C.P.R., 16 Man. L.R. 343, distinguished 486
Williams and Ancient Order of United Workmen, Re, 14 O.L.R. 482, followed 310
Williams v. Local Union of Mine Workers, 41 D.L.R. 719, afirmed.. 123
Williams Machinery Co. v. Graham, 39 D.L.R. 140, affirmed 42
Willis v. Watney, 45 L.T.R. 739, followed 573
Wilson v. Northampton Junction R. Co., L.R. 9 Ch. 279, followed 160
Wilson and Toronto General Trusts Corp., Re, 15 O.L.R. 596, followed 242

Wil-Zie.] COLUMN

Wilton v. Rochester German Underwriters Agency Co., 11 A.L.R. 574, followed 36
Winfield v. Fowlie, 14 O.R. 102, followed 573
Witherspoon v. Tp. of East Williams, 14 O.W.N. 221, reversed 419
Wright v. Carter, [1903] 1 Ch. 27, followed 148

York Sand and Gravel v. William Cowlin & Son, 14 O.W.N. 89, reversed. 134
Yost v. International Securities Co., 12 O.W.N. 410, affirmed 579
Young, Ex parte, 32 N.B.R. 178, followed 93

Zierenberg v. Labouchere, [1893] 2 Q.B. 183, followed 365

A DIGEST

OF

ALL REPORTED CASES DECIDED BY THE FEDERAL AND PROVINCIAL COURTS IN THE DOMINION OF CANADA, AND BY THE PRIVY COUNCIL ON APPEAL THEREFROM, DURING THE YEAR 1918.

ABANDONMENT.

Of expropriation proceedings, see Expropriation.

Of property in insolvency proceedings, see Assignments for Creditors.

Of contract, see Contracts.

As ground for alimony, see Divorce and Separation.

Of highways, see Highways V.

ABATEMENT.

Of nuisance, see Nuisance.

Of legacies, see Wills.

ABORTION.

Annotation.

Abortion by physician's operation; justification; rebuttal; other offences: 42 D.L.R. 439.

(§ I—2)—SUPPLYING DRUGS—ATTEMPT.

If there is sufficient evidence to justify a reasonable inference that an accused attempted to obtain noxious substances for the purpose of causing a miscarriage; that he believed he had obtained them, and that he tried to administer them, he may be properly convicted of an "attempt" under sec. 72 of the Criminal Code. It is immaterial whether the substances obtained in fact contained noxious ingredients or not.

Rex v. Pettibone, 41 D.L.R. 411, 13 A.L.R. 463, 30 Can .Cr. Cas. 164.

ABSTRACTS.

Of title, see Registry Laws; Land Titles (Torrens system); Vendor and Purchaser.

ABUTTING OWNER.

See Easements; Highways; Waters.

For compensation in expropriation proceedings, see Expropriation, III C; Damages, III L.

ACCELERATION.

Of time of payment, see Bills and Notes; Mortgage.

ACCEPTANCE.

Of bills of exchange, see Bills and Notes.

Of offer, see Contracts, I D.

Of goods, see Sale.

ACCESSORY.

See Accomplice.

ACCIDENT.

Insurance against, see Insurance.

For railway accidents, see Railways; Street Railways; Carriers.

For accidents to employees, see Master and Servant.

For accidents generally, see Negligence; Highways; Municipal Corporations; Automobiles.

ACCOMPLICE.

See Criminal Law.

ACCOUNTING.

Of executor or administrator, see Executors and Administrators, IV C.

Between partners, see Partnership.

ACCOUNTS.

(§ I—1)—SURETY—LIEN ON GOODS FOR STORAGE—LOSS OF GOODS BY FIRE—LIABILITY.

Creed v. Jones Bros. & Co. (Sask), 39 D.L.R. 767.

OPEN CONTRACT—SETTLED ACCOUNT—PARTICULARS—ONUS.

Snitzler Advertising Co. v. Dupuis, 14 O.W.N. 78, affirmed in 15 O.W.N. 408.

ACTION.

I. NATURE AND RIGHT.
- A. In general; what actionable.
- B. Premature; conditions precedent; notice.
- C. Defences.

II. UNION, CHOICE, OR FORM OF REMEDIES.
- A. Kind; name.
- B. Consolidation.
- C. Splitting; successive suits.
- D. Joinder.

See also Pleading.

Costs and fees, see Costs.

Limitation of time for bringing, see Limitation of Actions.

Parties to action, see Parties.

As to removal of causes, see Certiorari; Courts.

Venue of, see Venue.

Ordering stay, see Stay of Proceedings.

Annotations.

Effect of war on actions by alien enemies; 23 D.L.R. 375, 380.

How affected by moratorium: 22 D.L.R. 865.

I. Nature and right.

A. In general; what actionable.

Action by alien enemy, see Aliens, III—19.

(§ I A—1)—Vexatious proceedings—Motion to dismiss as frivolous and vexatious—Judgment in previous action barring rights of plaintiff—Dismissal of action with costs.

Hill v. Lambton Golf and Country Club, 14 O.W.N. 143.

(§ I A—4)—Notice of—Sufficiency—Municipalities Act.

A letter giving notice of action required by s. 104 of c. 165 (C.S.N.B., 1903) is sufficient, although only the signature of the solicitor, without any addition, appears at the end of the notice. If such solicitor's name appears on the letterheading as attorney and counsellor-at-law, and the notice states that he will bring action "at the suit of" the plaintiff, naming her, the fact that the plaintiff threatened an action "for trespass" and in fact brought an action for trover is immaterial if the notice gave the defendant a clear idea of the grounds upon which the action would be brought and the reason therefor.

Murphy v. McMillan (N.B.), 43 D.L.R. 25.

B. Premature; conditions precedent; notice; demand.

(§ I B—5)—Penal action—Railway commission—Jurisdiction.

An action to recover a fine of $20 imposed by art. 1682d, C.C. (Que.), for breach of art. 1682c, may be brought without the permission of the railway commission. Such action is within the jurisdiction of the Circuit Court.

Giroux v. Quebec, Montreal & Southern R. Co., 19 Que. P.R. 357.

(§ I B—17)—Notice—Particulars—Dilatory exception.

In an action against the Montreal Tramways Co., preceded by a notice of action which appears sufficient, a dilatory exception for the purpose of obtaining particulars of fault alleged in the notice and pleaded in the declaration, will be refused.

Maurizio v. Montreal Tramways Co., 19 Que. P.R. 254.

If a notice of action does not contain sufficient details, a delay of a month will be granted to the defendant to obtain information and to come to a conclusion upon the plaintiff's claim.

Alexander v. Montreal Tramways Co., 19 Que. P.R. 262.

II. Union, choice, or form of remedies.

A. Kind; name.

(§II A—40)—Effect of death—Continuation of proceedings.

The nullity declared by art. 269, C.C.P., with regard to proceedings had subsequently to notice given of the death of one of the parties, is not absolute. When there are several parties, and the purpose of the action is divisible, the death of one of the parties not followed by a continuance of the proceedings by the heirs, does not prevent the proceedings being carried on against the other parties, but reserving the rights of the heirs of the deceased party. It does not apply to the representatives of a deceased co-defendant.

La Ville de Beaconsfield v. Martin, 20 Que. P.R. 125.

Possessory action—Realty—Defence.

A defendant sued in a possessory action, who claims to have rights of property in the real estate subject of the litigation, ought to enforce them by a petitory action, and not by a defence to the action.

La Village de Ste. Geneviève v. O'Leary, 54 Que. S.C. 158.

Confessory action—Servitude—Passage—Lane—Obstructions—Lessees—Costs.

When a defendant admits in his defence and has admitted before action, the right of the plaintiff to the servitude which he claims, a confessory action is useless and aimless. A confessory action based upon the acts of a lessee should be brought against the latter and not against the owner of the servient land. Even if some lessees should have sometimes hung linen in a lane over which one-third had a right-of-way, this fact would not constitute an obstruction sufficiently serious to justify the latter in bringing a confessory action against the proprietor of the servient land.

Sénécal v. Charest, 27 Que. K.B. 133.

Action for cancellation of contract—Note—Summary procedure.

An action for cancellation of a contract for services is not summary in its nature, even if in the conclusion, there is claimed the amount of a note given at the time the contract was made. An objection to an action taken by mistake as "summary" can be raised by exception to form.

Pellerin v. Blanchard, 19 Que. P.R. 149.

Possessory action—Allegations—Character of possession—Other remedies.

On the return of a possessory action directed against him, a defendant may produce, in support of his conclusions, allegations to establish his ownership, and he may also allege that he is not only holder but owner. A defendant may also plead his rights of ownership in order to determine the nature of his possession, and whether art. 2200, C.C. (Que.), relating to joinder of possession, applies. There can be no possessory action when the possession of the parties has ceased to be exclusive and certain, and has become mixed. The plaintiff must shew clearly an exclusive and certain possession during the year and a day which preceded the action. In such case, the plaintiff must proceed by

action for setting of landmarks, or other legal remedy, but not by way of possessory action.

Bourbonnais v. Denis, 24 Rev. de Jur. 104.

B. Consolidation.

(§ II B—45)—Power of Court.

O. 49, r. 1 of the British Columbia rules, which provides that, "causes, matters or appeals may be consolidated by order of the court or judge in such manner as to the court or judge may seem meet," is absolute and leaves the question of the consolidation of actions, so far as the power of the court or judge is concerned, entirely in the hands of the court or judge. Therefore, even if a judge's decision as to consolidation is ill-judged, it is not ultra vires.

Dominion Trust Co. v. New York Life Ins. Co. (P.C.), 44 D.L.R. 12, [1918] 3 W.W.R. 850, affirming 32 D.L.R. 33, 23 B.C.R. 343.

Consolidation—Application for—Foreclosure actions—Actions independent—Necessity of notice under O. 64, r. 13.

Buscombe Securities v. Windebank (B.C.), [1918] 3 W.W.R. 897.

D. Joinder.

See Pleading; Parties.

ADJOINING OWNERS.

See Abutting Owner.

ADMINISTRATION.

Of decedents' estates, see Executors and Administrators.

Of lunatics' estates, see Insane Persons.

Of infants' estates, see Infants.

ADMIRALTY.

I. Jurisdiction.

II. Practice; pleading and procedure.

As to matters peculiar to vessels and navigation, see Shipping; Carriers; Collision; Seamen.

Annotations.

Liability of a ship or its owners for necessaries supplied: 1 D.L.R. 450.

Collisions on high seas; limitation of jurisdiction: 34 D.L.R. 8.

I. Jurisdiction.

Jurisdiction of Prize Court, see Prize Court.

(§ I—1)—Collision—Claims for life and property.

The proceeds of the sale of a ship sold under an order of the court to satisfy claims for loss of life and property arising from a collision on the high seas, should be distributed in accordance with the provisions of the Imperial Merchant Shipping Act (1898, sec. 503), under which the claimants for loss of life or personal injury are entitled to seven-fifteenths of the fund paid into court and must rank pari passu with the claimants for loss of property for the balance of their claims. [See annotation, 34 D.L.R. 8.]

Canadian Pacific R. Co. v. S.S. "Storstad," 40 D.L.R. 615, 56 Can. S.C.R. 324, varying 34 D.L.R. 1.

Appeal—Jurisdiction—Leave of court.

The Exchequer Court, sitting in appeal, cannot entertain an appeal from an interlocutory decree without leave having previously been obtained from either the local Judge in Admiralty or from the Judge of the Exchequer Court, as required by sec. 20 of the Admiralty Act (R.S.C. 1906, ch. 141).

Johnson & Mackay v. The "Neff" (No. 1), 17 Can. Ex. 155.

II. Practice; pleading and procedure.

(§ II—5)—Transfer of cause—Comity.

On the ground of comity, the Exchequer Court will not entertain an application for the transfer of a cause from one admiralty district to another without the application having first been made before the local judge.

Johnson & Mackay v. The "Neff" (No. 2), 17 Can. Ex. 158.

(§ II—12)—Crimes on high seas.

The restrictions of Code sec. 591 as to obtaining the leave of the Governor-General before taking proceedings for the trial of offences within the admiralty jurisdiction are specially applicable to offences committed upon foreign ships within British and Colonial territorial waters; they do not apply to prosecutions for offences committed on British ships on the high seas. Cases as to which sec. 686 of the Merchant Shipping Act confers trial jurisdiction on Canadian courts in like manner as if the offence on the high seas had been committed within Canadian territory are not subject to Code sec. 591. [R. v. Heckman, 5 Can. Cr. Cas. 242, considered by Longley, J., and Ritchie, E.J.]

Rex v. Neilson, 40 D.L.R. 120, 30 Can. Cr. Cas. 1, 52 N.S.R. 42.

ADMISSIONS.

See Evidence.

ADULTERY.

(§ I—5)—As crime—Jurisdiction of magistrate.

Adultery, although a misdemeanour under an old unrepealed New Brunswick statute (R.S.N.B. 1854, ch. 145), is not a crime under the Criminal Code, and a New Brunswick magistrate has no jurisdiction under Part XVI. of the Code to try such offence.

Ex parte Belyea, 39 D.L.R. 24, 45 N.B.R. 308.

ADVERSE POSSESSION.

I. What constitutes.

A. In general.

B. On boundary.

C. Vendor and purchaser.

D. Landlord and tenant.

E. As to dower; mortgage or trust.

F. As to tenants in common and by entirety.
G. As to remaindermen or reversioners.
H. As to public; highway, canal, or tide land.
I. Colour of title.
J. Claim; hostility.
K. Extent and kind of possession.
II. Effect; time required.
III. Who may hold adversely.

Prescriptive rights, see Easements; Waters. See also Limitation of Actions.

Annotation.

Tacking; successive trespassers: 8 D.L.R. 1021.

I. What constitutes.

J. Claim; hostility.

(§ I J — 59) — Possession — Payment of taxes—Fencing—Cutting timber.

Open, visible, exclusive and continuous possession is necessary to acquire title to land under the Statute of Limitations (R.S.O. 1914, ch. 75, ss. 5 & 6), payment of taxes, fencing, cutting and removing timber held in the circumstances not to be sufficient to shew such possession, but to be mere acts of trespass.

McLeod v. McRae, 43 D.L.R. 350, 43 O.L.R. 34.

II. Effect; time required.

(§ II—64)—Grantee from Crown—Ejectment.

A person claiming under the title of persons who have been in the possession of land between twenty and sixty years cannot be put out of possession by the grantee of a grant from the Crown. [Emmerson v. Maddison, [1906] A.C. 569, distinguished.] The Statute of Limitations will run against the grantee of the Crown, not from the date of the grant, but from the commencement of adverse occupation as against the Crown.

Walsh v. Smith (N.S.), 43 D.L.R. 648.

III. Who may hold adversely.

(See previous Annual Digests.)

AFFIDAVITS.

(§ I—5)—Of debt—Requisites—Commissioners for taking.

The authority for taking an affidavit of debt out of New Brunswick for use in N.B. is found in ch. 62, C.S.N.B., 1903, sec. 3, which provides that when any person shall take any oath under said section his act shall be certified or authenticated in the same manner and with the same formality in all respects as though such act were the taking by him of the proof or acknowledgment of a conveyance. A jurat, as follows: "Sworn to at the City of Toronto in the County of York in the Province of Ontario this day before me. , a Notary Public in and for the Province of Ontario, does not comply with the requirements of this statute.

Murphy v. McMillan (N.B.), 43 D.L.R. 25.

AGENCY.

See Principal and Agent.

AGREEMENTS.

See Contracts; Sale; Vendor and Purchaser.

ALIENS.

I. In general; immigration; deportation.
II. Naturalisation.
III. Disabilities and capacities; property rights.

Foreign corporations, see Companies.

Foreign executors, see Executors and Administrators.

Annotations.

Deportation; exclusion from Canada of British subjects of Oriental origin: 15 D.L.R. 191.

Their status during war: 23 D.L.R. 375; 22 D.L.R. 865.

I. In general; immigration; deportation.

(See previous Annual Digests.)

II. Naturalization.

See annotation in 23 D.L.R. 383.

(§ II—14)—Status of persons naturalized.

The Naturalization Act, R.S.C. 1906, ch. 77, sec. 24, bestows upon persons naturalised under it the status of British subjects, and not merely the rights incidental to British subjects. This status continues to exist not only while such person is physically within Canada, but so long as he does not reside in his original country. [See annotation 23 D.L.R. 375.]

Re Solvang (Alta.), 43 D.L.R. 549, [1918] 3 W.W.R. 876.

III. Disabilities and capacities; property rights.

(§ III—15)—Public office.

An alien is disqualified from being a special constable, under art. 3287 R.S.Q., that being a ministerial office. [See annotation 23 D.L.R. 375.]

Haeck v. Clermont and Chabot (Que.), 39 D.L.R. 495.

Alien enemy—Magistrate's conviction for neglecting to register—Dominion order-in-council of 20th September, 1916—Permanent place of residence—No evidence to support conviction — Attempt to support under later orders-in-council—Military Service Act, 7 & 8 Geo. V. ch. 19—Quashing conviction—Costs—Refusal to protect magistrate and prosecutor.

Rex v. Hackam, 15 O.W.N. 190.

(§ III—19)—Alien enemy in neutral country—Specific performance.

In reference to civil rights an "enemy" is a person of any nationality residing and carrying on business in an enemy country; an Austro-Hungarian residing in a neutral

country is entitled to specific performance of an agreement for sale of land, but the Court will impound the purchase money to prevent it being used to assist the enemy. [See annotation 23 D.L.R. 375.]

Lampel v. Berger, 38 D.L.R. 47, 40 O.L.R. 165.

ALIEN ENEMY—RIGHT TO MAINTAIN ACTION.

An alien resident in Ontario is, although his country is at war with ours, so long as he conducts himself peaceably, and is within the proclamation of the 15th August, 1914, entitled to enjoy the protection of the law; and this includes the right to bring and maintain an action in any Court in Ontario. [Wells v. Williams (1697), 1 Salk. 46; Schaffenius v. Goldberg, [1916] 1 K.B. 284, followed.]

Kristo v. Hollinger Consolidated Gold Mines, 41 O.L.R. 51.

ALIEN ENEMY RESIDING IN PROVINCE—SUITS BY.

An alien residing in the Province of Quebec is not necessarily an enemy because he was born in a state which is at war with the British Empire, and does not lose his right of recourse in the Courts. A fortiori, the suspension of an action of an Armenian Christian cannot be demanded, as the latter were specially exempted by order-in-council of November 20, 1914, from registering themselves as enemy aliens.

Sap v. Picard, 20 Que. P.R. 178.

ALIMONY.

See Divorce and Separation.

(§ I—1)—LEGAL CRUELTY.

Imperiousness and meanness and insisting on running his household on an efficiency method, although extremely maddening to the wife, is not legal cruelty which justifies her in leaving her husband, or which entitles her to alimony.

Forget v. Forget (Man.), 40 D.L.R. 662.

ALTERATION OF INSTRUMENTS.

I. IN GENERAL.
II. BILLS AND NOTES.
  A. In general.
  B. What alterations are material.

I. In general.

(See previous Annual Digests.)

II. Bills and notes.

B. WHAT ALTERATIONS ARE MATERIAL.

(§ II B—10)—SIGNATURE.

Altering a promissory note by adding the words "Cohen Frères, per" before the signature M. Cohen is not a material alteration rendering the note void, inasmuch as the liability of the maker remains unchanged.

Rabinovitch v. Cohen, Marks v. Cohen, British Canadian Fur Trading Co. v. Cohen, 39 D.L.R. 320, 53 Que. S.C. 174.

(§ II B—12)—FILLING IN RATE OF INTEREST.

Filling in a rate of interest in a lien note without the maker's authority after it has been signed is a material alteration, and avoids the instrument.

Allen v. Gray, 38 D.L.R. 41, 10 S.L.R. 393.

AMENDMENT.

Of judgment, see Judgment.
Of pleading, see Pleading, I N.
Of information, see Summary Conviction; Criminal Law; Certiorari.

ANIMALS.

I. RIGHTS AND LIABILITIES CONCERNING.
  A. Rights of owners generally.
  B. Liability for killing or injuring.
  C. Liability for injuries by.
  D. Running at large.
  E. Animals with infectious diseases.
  F. Tax on dogs.
II. CRUELTY TO.

Annotations.

Animals at large through "wilful act or omission of owner": 32 D.L.R. 397; 33 D.L.R. 423; 35 D.L.R. 481.

I. Rights and liabilities concerning.

A. RIGHTS OF OWNERS GENERALLY.

Liability under Railway Act for injury to animals by trains, see Railways, II D.

C. LIABILITY FOR INJURIES BY.

(§ I C—26)—OPEN WELLS ACT—NON-COMPLIANCE WITH—ANIMALS AT LARGE—DAMAGES.

One who has not complied with the provisions of sec. 3 of the Open Wells Act (R.S.S. 1909, ch. 124), providing that "no person shall have or store on his premises or on any premises occupied by him any kind of threshed grain accessible to stock of any other person which may come or stray upon such premises," must make good the damage to the owner of animals which are lawfully at large under the Stray Animals Act, and stray onto his premises and are killed by eating grain improperly left accessible to them.

Watson v. Guillaume, 42 D.L.R. 380, 11 S.L.R. 348, [1918] 2 W.W.R. 1047.

IMPOUNDING — DAMAGES — BY-LAW — VALIDITY—RIGHT OF OWNER AGAINST DISTRAINOR.

The defendant seized the plaintiff's horses damage feasant in his oat field and impounded them, claiming $1,000 damages, which amount the plaintiff paid under protest. Held, that the damages claimed were excessive and the $50 would cover all the damage done on the occasion of the impounding, but that such claim of excessive damage did not render the seizure and impounding illegal [Buist v. McCombe, 8 A.R. (Ont.) 598, and Graham v. Spettigue, 12 A.R. (Ont.) 261, distinguished.] That the fact that the municipal by-law restraining animals from running at large had been passed by a prior council did not render the by-law ultra vires or invalid. That [following Fogde v. Parsenau, 10 S.L.R. 423] an action lay by the

owner of the animals against the distrainor for the excess damages paid to the pound-keeper.

Campbell v. Halvorsen, 11 S.L.R. 58, [1918] 1 W.W.R. 462.

(§ IC—30)—Dangerous dog—Liability of owner.

The owner cannot escape liability for damages caused by the bite of his dog, on the ground that at the time of the accident he had entrusted his animal to the care of a child. Similarly, he is responsible if he leaves his dog unmuzzled to run about a public street, when it is the nature of such dog to bite strangers who approach him or seek to caress him.

Laurencelle v. Coomber, 54 Que. S.C. 370.

D. Running at large.

(§ I D—35)—Railway Act—Negligence—Leaving grain unguarded—Injury to horses.

Every person must be taken to know that horses are likely to consume grain to excess, if the opportunity to do so is afforded them; therefore if it be left in such an unguarded condition as to permit of horses being attracted by it and eating it to their injury, the owner of the grain will be liable for the resulting damage, even though the horses are trespassers [Cooke v. Midland G.W.R. Co., [1909] A.C. 229, applied.] Sec. 294 of the Railway Act, R.S.C. 1906, ch. 37, is available only to a railway company.

Fulton v. Randall, Gee & Mitchell (Alta.), [1918] 3 W.W.R. 331.

E. Animals with infectious diseases.

(§ I E—40)—Animal Contagious Diseases Act—Right of action.

In Ward v. Hobbs, 4 App. Cas. 13, the House of Lords expressly refused to extend to contagious or infectious diseases the principle imposing on persons having in their custody or charge dangerous substances a special duty commensurate with the danger.

O'Mealey v. Swartz (Sask.), [1918] 3 W.W.R. 98, 11 S.L.R. 376.

II. Cruelty to.

(See previous Annual Digests.)

ANNUITIES.

See Wills.

Under Workmen's Compensation Act, see Master and Servant, V—340.

ANNULMENT.

Of marriage, see Marriage, IV; Divorce and Separation.

Of convictions, see Summary Convictions; Certiorari; Habeas Corpus; Criminal Law.

Of contracts, see Contracts; Sale; Vendor and Purchaser.

Of by-laws, see Municipal Corporations.

ANTE-NUPTIAL CONTRACT.

See Husband and Wife.

APPEAL.

I. Right of appeal: what cases reviewable.
- A. In general.
- B. Finality of decision.
- C. Criminal cases.
- D. Modes of review.

II. Jurisdiction of particular Courts.
- A. Of Supreme Court of Canada.
- B. Of Exchequer Court of Canada.
- C. Of Provincial Courts.

III. Transfer of cause; parties; time limitations.
- A. Right to transfer.
- B. Effect; subsequent proceedings in Court below.
- C. Parties.
- D. Mode; conditions; regulations.
- E. Citation, notice; appearance.
- F. Time; extension.
- G. Security.

IV. Record and case in Appellate Court.
- A. In general.
- B. What should be shewn by.
- C. Contradictions in.
- D. Amending; perfecting.
- E. Affidavits.
- F. Evidence; adding fresh evidence.
- G. Stenographer's notes.
- H. Instructions.
- I. Findings.
- J. Opinions.
- K. Motions and orders.
- L. Certificates.
- M. Abstracts.
- N. Case made; statements.
- O. Bill of exceptions.
- P. Assignments of error.
- Q. Waiver of assignments of error.
- R. Briefs.

V. Objections and exceptions; raising question in lower Court.
- A. Definiteness; sufficiency.
- B. Necessity for exceptions.
- C. Time for exceptions.
- D. Raising questions by motion or other mode.

VI. Preliminary motions; dismissal; abatement; abandonment.
- A. In general.
- B. Grounds for dismissal.
- C. Preferences of causes.
- D. Continuance and submission.

VII. Hearing and determination.
- A. In general; rules of decision.
- B. Who may complain.
- C. Evidence; amendments; trial de novo.
- D. Presumptions.
- E. What reviewable, generally.
- F. Decisions in favour of party, or not affecting him.
- G. Objections as to which party is estopped.
- H. Interlocutory matters, orders, etc., not appealed from.
- I. Discretionary matters.
- J. Questions not raised below.
- K. Errors waived or cured below.
- L. Review of facts.

M. What errors warrant reversal.
N. Effect of matters occurring after decision below.
VIII. JUDGMENT.
A. In general.
B. Rendering modified judgment.
C. Remanding; granting new trial.
D. Costs; interest; damages for delay.
E. Effect of decision; subsequent proceedings.
F. Correction.
IX. REHEARING (ON APPEAL).
X. LIABILITY ON APPEAL BOND.
XI. LEAVE TO APPEAL.

Annotations.

Appellate jurisdiction to reduce excessive verdict: 1 D.L.R. 386.

Effect of war on appeals in actions by alien enemies: 23 D.L.R. 375, 382.

Judicial discretion; appeals from discretionary orders: 3 D.L.R. 778.

Service of notice of; recognizance: 19 D.L.R. 323.

Who may appeal as party aggrieved: 27 D.L.R. 645.

Pre-requisites on appeals from summary convictions: 28 D.L.R. 153.

Review of arbitration award: 39 D.L.R. 218.

I. Right of appeal; what cases reviewable.

A. IN GENERAL.

(§ I A—1)—BY COMPANY—SUSPENSION OF CHARTER—EFFECT.

A temporary revocation of a company's charter, subsequently restored, does not affect the prosecution of an appeal by a company instituted between the revocation and the revival; in the absence of Dominion legislation to the contrary, the legal capacity of a company chartered under a provincial statute is determined by provincial law.

Kildonan Investments v. Thompson, 38 D.L.R. 96, 55 Can. S.C.R. 272, affirming 25 Man. L.R. 446, affirming 21 D.L.R. 181.

JURISDICTION—JOINDER OF SEVERAL ACTIONS—SEPARATE CONDEMNATIONS—SUPREME COURT ACT, sec. 40, ARTS. 68-69 C.P.Q.

"L'Autorite" Ltd. v. Ibbotson, (Can.) 43 D.L.R. 761, 57 Can. S.C.R. 340.

RESERVATION OF APPEAL PENDING ANOTHER ACTION.

The Appellate Division will, where circumstances render it convenient, reserve the right of appeal in one action, until the appeal in a second action between the same parties has been disposed of.

Cromwell v. Morris, 12 A.L.R. 107, [See 34 D.L.R. 305.

APPEAL FROM ASSESSMENT—JURISDICTION OF SUPREME COURT.

Under sec. 41 of the Supreme Court Act, R.S.C. 1906, ch. 139, the Supreme Court of Canada has jurisdiction to entertain an appeal from a judgment of the local government board of Saskatchewan fixing an assessment; the duty of the court, if the evidence satisfies it that the assessment appealed against exceeds the "fair actual value," or the "true value," of the property to a "substantial" extent is to allow the appeal and reduce the assessment to such "fair actual value" as is disclosed by the evidence [Pearce v. Calgary, 9 W.W.R. 668, referred to].

Rogers Realty Co. v. Swift Current (Can.), [1918] 2 W.W.R. 214, 44 D.L.R. 309, 57 Can. S.C.R. 534.

RIGHT OF APPEAL—WINDING-UP ACT—AMOUNT INVOLVED IN THE APPEAL.

Parent v. Matte, 24 Rev. de Jur. 140.

FROM LEAVE TO SUE.

There is neither review nor appeal from a judgment granting permission to sue.

Dufresne v. Crown Life Assurance Co., 19 Que. P.R. 263.

(§ I A—2)—TO PRIVY COUNCIL—CRIMINAL CODE.

Sec. 1025 of the Criminal Code, which purports to limit the right of appeal to the Judicial Committee of the Privy Council in criminal matters, does not apply to a prosecution by indictment for a non-criminal offence such as the class of non-criminal nuisances referred to in Cr. Code sec. 223.

Toronto Railway Co. v. The King, 38 D.L.R. 537, [1917] A.C. 630, 29 Can. Cr. Cas. 29, reversing 25 D.L.R. 586, 25 Can. Cr. Cas. 183, 34 O.L.R. 589.

B. FINALITY OF DECISION.

(§ I B—5)—ORDER IN CHAMBERS—"FINALLY DISPOSE OF ACTION"—LEAVE TO APPEAL.

An appeal by the plaintiffs from the order of Middleton, J., setting aside an order of the Master in Chambers, whereby two British companies were added as defendants in this action and permission was given to serve process upon them out of the jurisdiction, was dismissed, upon the ground that the order appealed from did not "finally dispose of the whole or any part of the action," and leave to appeal had not been obtained: Rule 507 (2).

Boston Law Book Co. v. Canada Law Book Co., 43 O.L.R. 233, affirming 43 O.L.R. 13.

SHERIFF'S INTERPLEADER—FINAL ORDER.

Held, that an order of a District Court Judge summarily determining in Chambers the validity of a claimant's claim in a sheriff's interpleader proceeding is a final order, and that therefore no appeal lies therefrom to a Judge of the Supreme Court in Chambers under sec. 56 of the District Courts Act.

Walton v. Berry, 11 S.L.R. 66, [1918] 1 W.W.R. 564.

(§ I B—12)—INJUNCTION.

When a Judge of the Superior Court, on the production of a detailed petition supported by an uncontested affidavit, orders the issuance of a writ of interlocutory injunction, the Court of Appeal will not allow an appeal from that interlocutory judgment.

Corporation de la Ville de Joliette v. Pellant, 27 Que. K.B. 78.

A judgment dismissing a petition for interlocutory injunction is a final judgment which may be appealed, de plano.

Cowansville Hotel Co. v. Beatty, 19 Que. P.R. 144.

(§ I B—15)—Interlocutory order—Notice of appeal.

Judgment having been entered by default and damages ordered to be assessed, the plaintiff gave notice of the date upon which the damages were to be assessed. On the hearing the defendant moved to set aside the judgment and that he be allowed in to defend. This motion was dismissed, and the damages were then assessed and final judgment entered. Thirty-five days later the defendant gave notice of appeal, both from the final judgment and from the order refusing to re-open the case. On the hearing of the appeal respondent raised the preliminary objection that the order refusing to re-open was interlocutory; that the notice of appeal was, therefore, out of time and the appeal should be dismissed. Held, that the order refusing to re-open the case being an interlocutory order, the notice of appeal was out of time, and the appeal should be dismissed.

Chilliwack Evaporating & Packing Co. v. Chung, 25 B.C.R. 90, [1918] 1 W.W.R. 870.

A judgment dismissing an exception to form, which raises a question of delay, is not an interlocutory judgment from which an appeal should be allowed.

Caressa v. David, 20 Que. P.R. 225.

Motion for interrogatories.

A judgment dismissing a motion to have certain interrogatories on articulated facts held pro confessis, is not an interlocutory judgment on which appeal will be allowed.

Bergeron v. O'Brien, 20 Que. P.R. 233.

C. Criminal cases.

(§ I C—25)—Error in instruction as to corroboration of accomplice.

A new trial will be ordered on the ground of a mistrial where the trial Judge erroneously states to the jury that there was corroboration of the testimony of an accomplice and also fails to direct the jury as to the danger of convicting on an accomplice's evidence unless corroborated. [R. v. Baskerville, [1916] 2 K.B. 658, applied.]

Rex v. Morrison, 38 D.L.R. 568, 51 N.S.R. 253, 29 Can. Cr. Cas. 6.

Keeping disorderly house—Two justices.

There is no appeal under Code, sec. 797, as amended by Can. Stat. 1913, ch. 13, from a conviction on summary trial for keeping a disorderly house when made by a city police magistrate trying the case without the consent of the accused under Code ss. 773 (f) and 774. [R. v. Brown (1916), 26 Can. Cr. Cas. 97, 30 D.L.R. 645, 9 A.L.R. 494, referred to; see R. v. Merker and Daniels, 27 Can. Cr. Cas. 113, 37 O.L.R. 582.]

Rex v. Berenstein, 29 Can. Cr. Cas. 435, 24 B.C.R. 361.

(§ I C—28)—By Crown on question of law—Evidence.

The notes of the decision of a Judge holding a speedy trial without a jury may be filed at a later date than that of the delivery of the oral judgment and must be given credence on a motion to the appellate Court for leave to appeal as to the grounds on which the decision rested; the Court will not take into consideration in contradiction of such notes the affidavits of counsel for the appellant, even of the Crown counsel where the Crown asks leave to appeal, nor can the Crown be given leave to appeal as on a question of law when the case was dismissed for insufficiency of the evidence adduced to prove an essential ingredient of the offence.

Rex v. Jacobs, 30 Can. Cr. Cas. 80, 26 Que. K.B. 382.

II. Jurisdiction of particular Courts.

A. Of Supreme Court of Canada.

(§ II A — 35) — Prohibition — Future rights.

In an application for a writ of prohibition no appeal lies to the Supreme Court of Canada; it does not fall within any of the classes of sec. 46 of the Supreme Court Act. [Desormeaux v. Ste. Thérèse, 43 Can. S.C.R. 82; Olivier v. Jolin, 36 D.L.R. 729, 55 Can. S.C.R. 41, followed.]

Bouchard v. Sorgius, 38 D.L.R. 59, 55 Can. S.C.R. 324, 29 Can. Cr. Cas. 245, reversing 26 Que. K.B. 242.

Court of King's Bench—Public Utilities Commission.

Under s. 37 of the Supreme Court Act (R.S.C. 1906, ch. 139) an appeal lies to the Supreme Court of Canada from a judgment of the Court of King's Bench, Que., in an appeal from an order of the Quebec Public Utilities Commission overruling an objection as to its jurisdiction to permit the Intercolonial Railway to run its engines and cars over the railway line of the Canada Gulf Terminal Railway Co. Fitzpatrick, C.J., and Idington, J. (dissenting), held that the constitution of a Public Utilities Commission in Quebec did not create a Court in the sense of that word in the Supreme Court Act and s. 37 of that Act could not be applied.

Canada & Gulf Terminal R. Co. and Charles J. Fleet v. The King, 43 D.L.R. 291, 57 Can. S.C.R. 140.

C. Of Provincial Courts.

(§ II C—50)—Jurisdiction of Court of King's Bench—Prohibition—Quashing municipal by-law—Recorder's Court.

There is an appeal to the Court of King's Bench from a judgment refusing to grant a writ of prohibition to prevent a Recorder's Court from executing judgments based upon a municipal by-law, whose quashing is likewise asked for.

Drapeau v. La Cour de Recorder de la cité de Quebec, 27 Que. K.B. 182.

ASSIGNMENT FOR CREDITORS—APPOINTMENT OF CURATOR.

There is no appeal to the Court of King's Bench from an order of a Judge of the Superior Court appointing a curator in a judicial abandonment of property even if such appointment has been contested between the creditors.

Gauthier and Laviolette v. Lamarre, 27 Que. K.B. 320.

COURT OF KING'S BENCH—WINDING-UP MATTER—MOTION TO REJECT.

The fact that a Court of first instance had discretionery power in pronouncing judgment may be a reason for not granting leave to appeal or for confirming it but is not a reason for rejecting the appeal on motion, when the permission to appeal was granted by a judge A judgment directing a sale of the real property of an insolvent company, and refusing an application to stay the sale cannot be appealed to the Court of King's Bench because the object of the appeal is not a sum of money.

La Compagnie de Sainte-Foye and Parent v. Matte, 27 Que. K.B. 306.

INTERLOCUTORY JUDGMENT—COURT OF REVIEW.

The Court of Review has no jurisdiction to hear and adjudicate upon an appeal from an interlocutory judgment in a case appealable to the Court of King's Bench.

Harvey v. Mutual Life Assurance Co., 19 Que. P.R. 364.

(§ II C — 65) — JURISDICTIONAL AMOUNT — AFFIDAVIT — LIQUIDATOR— WINDING-UP ACT.

Proof of the amount involved in an appeal can be made by affidavit and it is the duty of the Court hearing the application to determine the amount from the affidavits filed: [Falkner's Gold Mining Co. v. McKinnery, [1901] A.C. 581.] On a liquidator's application under s. 101 (e) of the Winding-up Act, R.S.C. 1906, ch. 144, as amended by 5 Geo. V., ch. 21, sec. 1, for leave to appeal from an order directing the payment of a solicitor's costs, the Court should, in the absence of any contradiction, accept the sworn statement of the liquidator that the amount involved in the appeal exceeds the amount required to give jurisdiction.

Re Prudential Life Insurance Co. (Man.), [1918] 3 W.W.R. 508.

III. Transfer of cause; parties; time limitations.

E. CITATION; NOTICE; APPEARANCE.

(§ III E—91)—NOTICE OF APPEAL.

In ordinary cases of appeal to the Supreme Court of Canada notice of appeal is not required before or after approving of the security.

Albion Motor Express Co. v. City of New Westminster (B.C.), [1918] 3 W.W.R. 23.

FILING—NOTICE—SERVICE—SECURITY.

An inscription in appeal to the Court of King's Bench must be deposited and stamped at the prothonotary's office before it is served upon the opposite party and before a valid notice of security may be given. The Court will order the retransmission of the record to the Superior Court for the giving of a new security, unless respondent declares himself satisfied with the security already given.

Protestant Board of School Commissioners v. Quinlan, 20 Que. P.R. 255.

F. TIME; EXTENSION.

(§ III F—95)—JUDGMENT IN DEFAULT OF APPEARANCE—FINAL OR INTERLOCUTORY —DISMISSAL—TIME FOR APPEAL.

An order of a County Court Judge dismissing a motion to set aside an interlocutory judgment, entered in default of appearance, is an interlocutory order and therefore, under s. 15 (b) of the Court of Appeal Act, ch. 51, R.S.B.C. 1911, an appeal therefrom must be brought within 15 days [Gladwin v. Cummings, Cassels' S.C.Dig. 427, followed; Voight v. Orth, 5 O.L.R. 443, distinguished].

Chilliwack Evaporating & Packing Co. v. Chung (B.C.), [1918] 1 W.W.R. 870. [See 25 B.C.R. 90.]

DATE OF JUDGMENT—REVIEW.

The date of the judgment of the Court of Review is that of the day upon which it was received to be registered by the prothonotary of the district where the judgment was originally rendered. Therefore an appeal was well taken on July 14, where the judgment was rendered in review on June 25, registered in the Court of Review on the 28th, and received by the prothonotary of Montreal on the 29th of the same month.

Okopny v. Atlas Construction Co., 27 Que. K.B. 276.

(§ III F—98)—EXTENSION OF TIME FOR APPEALING—JURISDICTION OF COURT— TITLE TO LAND—REMOVAL OF CAUSE.

Re Harmston v. Woods, 39 D.L.R. 793, 40 O.L.R. 171. [See 39 O.L.R. 105.]

EXTENDING TIME FOR APPEAL—BONÂ FIDE INTENTION — OFFICER OF COMPANY — SPECIAL CIRCUMSTANCES—TERMS.

Where the applicant for an order extending the time for appealing from a judgment of Appellate Division is an incorporated company, the rule that the applicant must shew a bonâ fide intention to appeal entertained while the right to appeal existed is not to be categorically and literally applied; it is sufficient if the officer of the incorporated company whose duty it is to deal with the matter, entertains, within the time allowed for appeal, the bonâ fide intention of submitting the question of appealing to the board of directors of the company, and is prevented by special circumstances from so doing. [Smith v. Hunt (1902), 5 O.L.R. 97, distinguished.] An order was made in November, 1916, under r. 176, extending (upon terms) the time for an appeal by the plaintiff company from a judgment pronounced on the 14th July, 1916: according to r. 491, the appeal should have been set

down for hearing on or before the 15th September, 1916.

Canadian Heating and Ventilating Co. v. T. Eaton Co. and Guelph Stove Co., 41 O.L.R. 150.

EXTENSION OF TIME—DELAY—"JUSTICE OF THE CASE."

An extension of time to appeal to the Supreme Court of Canada, under sec. 82 of the Exchequer Court Act, will not be granted after a delay of 14 months, particularly when "the justice of the case" does not warrant the granting of such an extension.

The King v. Quebec North Shore Road Trustees and Burroughs, 17 Can. Ex. 488.

EXTENSION OF TIME—WINDING-UP ACT.

Upon an application under the Winding-up Act, R.S.C. 1906, ch. 144, for an extension of the time within which to appeal, such time having expired, it is necessary to shew that the intention to appeal was formed within the time limited or that there was difficulty in communicating with clients and obtaining instructions.

B.C. Securities v. Mutual Life Assurance Co. (B.C.), [1918] 1 W.W.R. 733.

FAILURE TO ENTER IN TIME.

Notice of appeal having been given, the appellant on the fourth day before the sittings submitted an appeal book to the respondent's solicitors for approval. In the absence of the member of the firm who had the conduct of the case, his partner refused to approve, intimating that he knew nothing of the case and it would be necessary to wait for the return of his partner, but that he would, however, take no advantage of failure to get the case down in time owing to the delay occasioned by the absence of his partner. On the day before the sittings of the Court, appellant's solicitor, finding the book had not as yet been approved, gave notice of motion to extend the time for entering appeal. This was opposed by respondent, the solicitor denying that he had given any undertaking not to take advantage of failure to enter the appeal in time. The application was refused by the Court, and appellant then made a further application on new material, which was also refused. Respondent then moved for a declaration of abandonment of the appeal, which was opposed by the appellant who again applied for an extension of time for entering the appeal. Held, that in the circumstances the application for a declaration of abandonment of the appeal be refused and that an extension of time be granted for entering the appeal.

B.C. Independent Undertakers v. Maritime Motor Car Co., 24 B.C.R. 300.

EXTENSION OF TIME—DISCRETION—SPECIAL CIRCUMSTANCES.

A Judge, in extending the time for appealing to the Court of Appeal under r. 704, has an unfettered discretion, and it is not necessary to shew special circumstances.

Smith v. Crawford, 11 S.L.R. 168.

EXTENSION OF TIME—POWER OF COURT.

Notwithstanding the apparent implication of the decision in Great Northern R. Co. v. Furness, Withy & Co., 40 Can. S.C.R. 455, the decision in the later case of Goodison Thresher Co. v. Tp. of McNab, 42 Can. S.C.R. 694, is an express authority for the conclusion that the term of sixty days, which under sec. 69 of the Supreme Court Act, ch. 139, R.S.C. 1906, is the period within which an appeal to the Supreme Court of Canada must be brought, cannot be extended by the Court appealed from or by a Judge thereof. The appellant who has delayed beyond the sixty days in bringing his appeal is not deprived of his right of appeal, but, as a consequence of his delay, he must shew some reasonable cause therefor or other special circumstances and must submit to such terms as the Judge or Court deems reasonable. Where the application for the allowance of the appeal is made within the sixty days, although no notice of the application has been given, and the Judge, instead of approving of the bond ex parte with a reservation of leave to respondent to move to set it aside, allows time for the giving of notice, the application should be looked upon as adjourned and it should be held that the appellant has brought himself within the provisions of sec. 69 and is entitled to have his application disposed of under that section, even though the sixty days have expired at the hearing of the adjourned application, without being required to shew special circumstances to bring himself within sec. 71 (Per Beck, J., dissenting).

Rohoel v. Darwish, 13 A.L.R. 312, [1918] 2 W.W.R. 525.

EXTENSION OF TIME—MOTION TO QUASH.

A Justice of the Court of Appeal for British Columbia has power to, and will in a proper case, extend the time for giving notice of appeal under sec. 70 of the Supreme Court Act, notwithstanding that notice has been given by the respondent of intention to move the Supreme Court to quash the appeal. S.C. rule 5 is not a bar to such an application.

Adolph Lumber Co. v. Meadowcreek Lumber Co. (B.C.), [1918] 3 W.W.R. 305. [See 25 B.C.R. 298, [1918] 2 W.W.R. 466, revised by Canada Supreme Court.

G. SECURITY.

(§ III G — 100) — SECURITY — COMPANY — GENERAL AUTHORITY—ADDED PARTIES—INTEREST.

Fiduciary legatees and testamentary executors of one of the parties in the Superior Court may join other parties to make an appeal. Security in appeal should conform strictly to the law and cover an obligation to effectually prosecute the appeal; and to satisfy the condemnation and to pay the costs and damages adjudged in case the judgment appealed from is confirmed. But if the security furnished is insufficient, the Court of Appeal will allow the appellant to complete it instead of causing him to lose his right of appeal. A company which is authorized by law to furnish security in the

Court of Appeal, may give one of its officers general authority to sign security bonds which it may agree to; there is no need of a special authorisation for each particular case. The defendant can not ask that certain appellants be struck out of the suit because they have no interest in the litigation, being rather advantaged than injured by the judgment of which they complain, when such appellants have been condemned to pay costs in the Court of first instance, and that it is the respondent himself who has added them as defendants.

Papineau v. Papineau, 27 Que. K.B. 379.

SECURITY BOND ON APPEAL BY GUARANTEE CO.—PROOF OF COPY OF RESOLUTION OF DIRECTORS APPOINTING ATTORNEY TO EXECUTE SECURITY BOND.

Gagne v. Factories Ins. Co., 24 Rev. de Jur. 224.

PROCEDURE—SECURITY IN APPEAL—SECURITY BY PLEDGE OF DEBTOR'S IMMOVABLE.

Couture v. Guerin, 24 Rev. de Jur. 223.

(§ III G—101)—BAIL ON CRIMINAL APPEAL.

While the Court of King's Bench (Que.) has jurisdiction to admit a prisoner to bail after sentence pending his appeal to the Supreme Court of Canada, it will leave him to his recourse to an application to the latter Court when the appeal has already been lodged.

Rex v. Brunet, 30 Can. Cr. Cas. 9, 27 Que. K.B. 224. [See 42 D.L.R. 405, 57 Can. S.C.R. 83, 30 Can. Cr. Cas. 16.]

IV. Record and case in Appellate Court.

A. IN GENERAL.

(§ IVA — 110) — ARBITRATORS' AWARD—RAILWAY ACT—PARTICULARS.

If an appeal is taken to the Superior Court from an award of arbitrators appointed under the Dominion Railway Act, the respondent cannot ask for particulars on the questions of law or of fact pleaded by the appellant.

Canadian Northern R. Co. v. Union Land Corp., 19 Que. P.R. 287.

F. EVIDENCE; FRESH EVIDENCE.

(§ IV F—135)—GROUND NOT PREVIOUSLY RELIED ON—EXCEPTIONS.

A Court of appeal should not consider a ground not previously relied on, unless satisfied that it has all the evidence bearing upon it that could have been produced at the trial, and that the party against whom it is urged could not have satisfactorily explained it under examination. [S.S. Tordenskjold v. S.S. Euphemia, 41 Can. S.C.R. 154, referred to.]

Re Union Supply Co. Caveat, 40 D.L.R. 282, 11 S.L.R. 157, [1918] 2 W.W.R. 305.

G. STENOGRAPHER'S NOTES.

(§ IV G—140)—LOSS OF NOTES—NOTES OF TRIAL JUDGE.

Where the stenographic report of the evidence taken at a trial cannot be obtained, and the only report of the evidence available to the appeal Court are the notes of the trial Judge, his findings of fact should be taken as practically conclusive, unless his notes themselves shew that he was in error (per Anglin, J.).

McCord v. Alberta and Great Waterways R. Co. (Can.), [1918] 3 W.W.R. 622, reversing 41 D.L.R. 722, 13 A.L.R. 476, [1918] 2 W.W.R. 708.

V. Objections and exceptions; raising question in lower Court.

(§ V A—235)—WAR RELIEF ACT—LEAVE TO PROCEED—WAIVER.

On an appeal from an order for a reference as to the damages sustained by a defendant by reason of an injunction, it is not open to the defendant to raise for the first time the preliminary objection that no leave to proceed had been obtained by the plaintiff under the provisions of the War Relief Act. Sec. 10 of the War Relief Act, ch. 74, 1916 (B.C.), as amended by sec. 8, ch. 74, 1917, does not apply to proceedings in the Court of Appeal. A County Court Judge has not the power to refer a question of law and fact to a registrar, the question of law should first be disposed of by him.

John Hing Co. v. Sit Way, [1918] 1 W.W.R. 978, 25 B.C.R. 153.

VI. Preliminary motions; dismissal; abatement; abandonment.

A. IN GENERAL.

(§ VI A—280)—NOTICE OF MOTION.

When a preliminary objection is taken that an appeal is out of time, the respondent will be held strictly to the grounds taken in his notice of motion.

Wardroper v. Stewart-Moore, 25 B.C.R. 69.

STAY PENDING APPEAL—ATTORNEY-GENERAL AS PARTY.

When some question arises while an action is pending which may affect the course of the trial and which is the subject of appeal to the Court of Appeal, the trial ought, in general and in the absence of very special reasons otherwise, to be stayed until the Court of Appeal has dealt with the question. Accordingly a stay was upheld until after the determination of an appeal from an interlocutory order adding the Attorney-General as a party defendant, there being no reason shewn why the plaintiff should go to trial immediately or any suggestion that, should he fail to do so, he would be prejudiced.

Esquimalt & Nanaimo R. Co. v. Dunlop (B.C.), [1918] 3 W.W.R. 828. [See 41 D.L.R. 737, [1918] 3 W.W.R. 25.]

NEW EVIDENCE—ADJOURNMENT.

An application to the Court of Appeal to allow in evidence a document that was in the pocket of a witness when examined in the Court below but inadvertently overlooked by counsel, will be refused. An application to adjourn the hearing of an appeal on the ground that counsel, through pressure of

work, was unable to prepare his case, will be refused if objected to by opposing counsel.

McIlwee v. Foley, 24 B.C.R. 532, [1918] 1 W.W.R. 222, [referred back by Privy Council for further enquiry, 44 D.L.R. 5.

VII. Hearing and determination.

A. In general.

(§ VII A—290)—Credibility of witnesses.

When a question of fact depends upon the credibility of witnesses, the Court of appeal will not reverse the finding of the trial Judge. [Wood v. Haines, 33 D.L.R. 166, referred to.]

Ogilvie Flour Mills Co. v. Morrow Cereal Co., 39 D.L.R. 463, 41 O.L.R. 58, affirmed 44 D.L.R. 557, 57 Can. S.C.R. 403.

E. What reviewable, generally.

(§ VII E—323)—Documentary evidence—Credibility of witness.

A finding of fact made by a trial Judge, depending on the credibility of the witnesses examined before him will not be disturbed by a Court of Appeal. When, however, there are other circumstances in the case, for example, documentary evidence, which shew that the story of any particular witness is unworthy of belief a Court may be justified in reversing the finding of the trial Judge.

Newton v. Botsford (Man.), 43 D.L.R. 330, [1918] 3 W.W.R. 722.

H. Interlocutory matters.

(§ VII H—340)—Separation action.

The Court of Review cannot take knowledge of interlocutory judgments given in an action for separation from bed and board.

Hetu v. Coutlee, 19 Que. P.R. 243.

J. Questions not raised below.

(§ VII J—400)—Fraud—Building contract.

In an action for breach of contract wherein fraud is neither alleged in the pleadings nor raised as an issue at the trial or by the notice of appeal and no amendment is sought at the trial to cover the alleged evidence thereof, an appeal Court should not proprio motu declare the entire contract void on the ground of fraud. Semble, where a contractor undertakes to make as the basis of a contract an estimate of the probable cost to him of erecting a building there is no fraud in making such estimate cover the possibilities of accidental disappointment that confront every builder and thereby making sure that the work will not cost him more than the estimated sum.

Jones & Lyttle v. Mackie (Can.), [1918] 2 W.W.R. 82, reversing [1917] 3 W.W.R. 1021.

(§ VII J—413)—Criminal case—Non-direction.

Non-direction may in some cases amount to misdirection of the jury although no objection was taken to the charge, and such non-direction constitutes a ground for a new trial if it appears that it operated to the prejudice of the accused and may have affected the verdict against him. [R. v. Blythe, 15 Can. Cr. Cas. 224, 19 O.L.R. 386, and Allen v. The King, 18 Can. Cr. Cas. 1, 44 Can. S.C.R. 331, applied; Eberts v. The King, 20 Can. Cr. Cas. 273, 7 D.L.R. 550, 47 Can. S.C.R. 1, distinguished.]

Rex v. Murray and Mahoney, 38 D.L.R. 395, 11 A.L.R. 502, 28 Can. Cr. Cas. 247, [See 28 D.L.R. 372, 33 D.L.R. 702, 25 Can. Cr. Cas. 214, 27 Can. Cr. Cas. 247, 9 A.L.R. 319.

(§ VII J—415)—Substitution of new claim.

A plaintiff who has failed to support the case made in his statement of claim, cannot, after the action has been tried, be permitted to abandon that claim and substitute an entirely new and inconsistent one.

Perry v. Perry (Man.), 40 D.L.R. 628, [1918] 2 W.W.R. 485, affirming 37 D.L.R. 89.

L. Review of facts.

(§ VII L—480)—Damages—Award of referee.

In an action for damages for personal injuries the Appellate Court will not, unless under very exceptional circumstances, disturb the verdict of a jury or of a referee for assessment of damages where consideration has been given to all the different elements of damage in respect to which the plaintiff is entitled to compensation and an award made which was deemed to be fair and reasonable, under all the circumstances.

Edwards v. City of Sydney, 40 D.L.R. 79, 52 N.S.R. 116.

Arbitration—Variation of award—"Good and special" reasons—Valuation.

An award of arbitrators under the Railway Act will not be varied by an Appellate Court upon a mere question of valuation except for "good and special" reasons, even when the Appellate Court is of opinion that the amount awarded is very excessive or very inadequate. [Ruddy v. Toronto Eastern R. Co., 21 Can. Ry. Cas. 377, applied.]

Noble v. Campbellford Lake Ontario & Western R. Co., 21 Can. Ry. Cas. 380.

Admiralty—Collision—Damages.

The Exchequer Court, sitting in appeal in Admiralty matters, will not interfere with the judgment of the lower Court as regards pure questions of fact or the quantum of damages, unless it appears clearly erroneous.

The "Ethel Q" v. Beaudette, 17 Can. Ex. 505.

(§ VII L—485)—Findings of trial Judge.

The Court was equally divided in the first action on the question whether the evidence sustained the findings of the trial Judge as to whether the defendants had improperly obtained and used the plaintiffs' list of subscribers and wrongfully endeavoured to entice away plaintiffs' employees. The trial judgment granting an injunction was therefore

affirmed, with some modifications as to the operation of the injunction.

Canada Bonded Att'y v. Leonard-Parmiter.

Canada Bonded Att'y v. G. F. Leonard, 42 D.L.R. 342, 42 O.L.R. 141, 13 O.W.N. 437, varying 12 O.W.N. 388.

NEGLIGENCE—VERDICT OF JURY.

A verdict of a jury that an accident was caused by the neglect and lack of proper supervision of a ship's officer in not having the gang plank sufficiently manned, will be set aside where the evidence is equally consistent with it being attributable to the impetuosity of one or more fellow servants.

Cleugh v. C.P.R. Co., 40 D.L.R. 512, 25 B.C.R. 335 [1918] 2 W.W.R. 416.

A verdict of a jury will not be set aside if they were justified in coming to the conclusion that the direct cause of the accident was in the arrangement and equipment of the train, and if there was evidence upon which they might properly find that the negligence of the company was in the system employed for the operation of the particular train.

Cheeseman v. Canadian Pacific R. Co., 40 D.L.R. 437, 45 N.B.R. 452, 22 Can. Ry. Cas. 253, reversed in 45 D.L.R.—, 57 Can. S.C.R. 439.

FINDING OF FACT OF TRIAL JUDGE—CREDIBILITY OF WITNESSES—DUTY OF APPELLATE COURT—ACTION ON CHEQUE—ALLEGED DELIVERY IN ESCROW—TRANSFER BY PAYEE TO THIRD PERSON—HOLDER IN DUE COURSE—ABSENCE OF KNOWLEDGE IN TRANSFEREE OF EQUITIES EXISTING BETWEEN DRAWER AND PAYEE.

Sutherland v. Harris and McCuaig, 15 O.W.N. 251.

M. WHAT ERRORS WARRANT REVERSAL.

(§ VII M—535)—REVERSAL OF FINDINGS OF FACT—ACTION ON BUILDING CONTRACT.

The general rule that a Court of appeal should not reverse the findings of fact of a trial Judge when the testimony of the witnesses is contradictory is not an absolute one. When the question arises which of two witnesses is to be believed, and the question turns on manner and demeanour, the Court of appeal always must be guided by the impression made on the Judge who saw the witnesses; but there may be obviously other circumstances, quite apart from manner and demeanour, which may shew whether a statement is credible or not, and such circumstances may warrant the Court in differing from the trial Judge, even on a question of fact turning on the credibility of witnesses, whom the Court has not seen [Coghlan v. Cumberland, [1898] 1 Ch. 704; Khoo Sit Hoh v. Lim Thean Tong, [1912] A.C. 323, followed]. On an appeal by the plaintiff from a judgment in an action, tried without a jury, arising out of an oral contract for the construction of a building, held (per Perdue, Cameron and Fullerton, JJ.A.) that the trial Judge's findings could not be supported by the evidence and that the judgment entered for the defendant should be set aside and judgment entered for the plaintiff. Howell, C.J.M., dissenting, thought the judgment of the trial should not be disturbed.

Bostrom v. Atkinson (Man.), [1918] 1 W.W.R. 591.

FINDING OF FACTS—EVIDENCE.

Where a question of fact has been decided by a tribunal which has seen and heard the witnesses the greatest weight ought to be attached to the finding of such a tribunal. But where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position than the Judges of the Appellate Court.

Dominion Trust Co. v. New York Life Ins. Co. (P.C.), [1918] 3 W.W.R. 850, 44 D.L.R. 12, affirming 32 D.L.R. 33, 23 B.C.R. 343.

(§ VII M—614)—SUMMARY CONVICTION—REHEARING ON MERITS.

On an appeal from a summary conviction, the complaint is to be reheard on the merits notwithstanding such an irregularity as the omission from the conviction of costs which the magistrate had ordered in the adjudication below. [R. v. Dunlop, 22 Can. Cr. Cas. 245, referred to.]

Rex v. Murphy (No. 1) (N.S.), 29 Can. Cr. Cas. 445.

CRIMINAL TRIAL—VERDICT.

The Court of Appeal is not to set aside a verdict in a criminal case on the ground that it does not accord with its views of what the verdict should be. To do so it must be satisfied that the evidence does not constitute such legal evidence as could satisfy honest men.

Rex v. Green; Rex v. Bosomworth (Alta.), 29 Can. Cr. Cas. 425.

(§ VII M—635)—JURY—QUESTIONS SUBMITTED—INSTRUCTIONS—NEW TRIAL.

If the jury does not answer questions submitted to them, which are of great importance to the right determination of the issues involved, on the ground that they do not understand one of the questions, and if they are not further instructed by the Judge, a new trial will be ordered.

Scott & Co. v. McCain Produce Co., 40 D.L.R. 342, 45 N.B.R. 379.

VIII. Judgment.

A. IN GENERAL.

See Judgments.

(§ VIII A—665)—PROVISIONAL EXECUTION—ALIMENTARY PENSION—ARREARS AND COSTS.

In an appeal from a judgment ordering a mother-in-law to pay an alimentary pension to her daughter-in-law for herself and her son, two Judges of the Court of Appeal (in Chambers) granted the respondent, upon proof by affidavit, provisional execution of the judg-

ment without security, but only for future pensions on maturity, and not for arrears or for costs.

Aubry v. Allard, 27 Que. K.B. 87.

C. Remanding; granting new trial.

See New Trial.

(§ VIII C—675)—Criminal case—Alibi—Misdirection—New trial.

If the omission of the Judge in his charge to the jury to refer to confirmatory circumstances brought out in evidence upon an alibi claim was such as to seriously prejudice the accused and to make the Judge's statement of the evidence misleading to the jury, it is proper to grant a new trial on a case reserved.

Rex v. Hyder (Sask.), 29 Can. Cr. Cas. 172.

D. Costs; interest; damages for delay.

See Costs.

F. Correction.

(§ VIII F—690)—Power of Court at final judgment to revise interlocutory judgment rendered by an Appellate Court.

Longpre v. Dumoulin, 24 Rev. de Jur. 1.

IX. Rehearing (on appeal).

See Trial; New Trial; Judgment.

(§ IX—695)—Interest on money demand—Discretion of lower Court—Appeal as to costs only—Appeal joined with other parts of judgment.

Buckley v. Vair, 39 D.L.R. 796, 40 O.L.R. 465.

X. Liability on appeal bond.

(See previous Annual Digests.)

XI. Leave to appeal.

(§ XI—720)—Workmen's Compensation Act—New evidence.

An application for leave to appeal from the award of an arbitrator under the Workmen's Compensation Act (1908, ch. 12, Alta.) will not be granted, where the affidavits filed shew that it is in reality an application for a new trial, so that further evidence may be adduced and not an appeal on a matter of law.

Ripka v. Georgetown Collieries (Alta.), 39 D.L.R. 593, [1918] 1 W.W.R. 757.

Special Act—Jurisdiction to grant leave.

Sec. 48 (1) of the Ontario Railway and Municipal Board Act (R.S.O. 1914, ch. 186), which provides that an appeal shall lie from the Board to a Divisional Court upon a question of jurisdiction or upon any question of law, applies to the jurisdiction given to the Board by the Ontario Act, 1917, 7 Geo. V. ch. 92, sec. 4, by which power is given to the City of Toronto to expropriate part of the Toronto and York Radial Railway, and although under the later Act no right of appeal is expressly given to the County of York, the Appellate Court has jurisdiction to grant leave.

Re City of Toronto and Toronto and York Radial R. Co. and County of York, 43 D.L.R. 49, 42 O.L.R. 545.

To Privy Council—Amount in dispute—Indemnity—Action.

Under art. 1056, C.C. (Que.) only one action can be brought on behalf of those who are entitled to an indemnity. Permission will be granted to appeal to the Privy Council, if the total amount of the indemnity granted is sufficient to allow the appeal.

Brown Corp. v. Bouchard, 20 Que. P.R. 209.

Privy Council—Leave—Personal injury action.

Leave to appeal to the Judicial Committee of the Privy Council from the dismissal by the Court of Appeal of an appeal from the dismissal of an action for $1,700 damages for personal injuries, refused.

Trainshi v. Canadian Pacific R. Co. (B.C.), [1918] 3 W.W.R. 281. [See [1918] 2 W.W.R. 1034.]

Criminal law—New trial—Evidence—Treason—Sale of tickets—Enemy.

The Court of King's Bench (in appeal) cannot give leave to appeal upon an application for a new trial because the verdict of guilty given against the appellant was contrary to the weight of evidence in a criminal action for treason, the accused having undergone his trial before a jury under an accusation of having sold transportation tickets to some Austrian subjects to disembark in a neutral port, but with the intention that they should go from there to Austria, which was then at war with England.

Shaefer v. The King, 27 Que K.B. 233. [Leave to appeal to Canada Supreme Court refused.]

Interlocutory order—Stay of action as "incidental"—Order during vacation—Prejudice.

Where an appeal is taken from an interlocutory order a stay of the whole action may, in certain cases, be a matter "incidental" to the appeal, within the meaning of sec. 10 of the Court of Appeal Act, R.S.B.C. 1911, ch. 51. The power given by sec. 10 of the Court of Appeal Act to make an order during vacation to prevent prejudice is not restricted to acts which may be committed during vacation.

Esquimalt & Nanaimo R. Co. v. Dunlap (B.C.), [1918] 3 W.W.R. 25. [See 41 D.L.R. 737.]

Leave to appeal from order of Judge in Chambers striking out jury notice—Rule 507 — Rule 398 — Action on policy of fire insurance—Defence of "arson"—Other defences—Intricate investigation—Case proper for trial without jury—Leave refused.

Goderich Manufacturing Co. v. St. Paul Fire and Marine Insurance Co., 13 O.W.N. 443.

LEAVE TO APPEAL FROM ORDERS OF JUDGE IN CHAMBERS—SECURITY FOR COSTS—RULE 507 (3) (B).

Smith v. Township of Tisdale, 14 O.W.N. 111. [See 15 O.W.N. 134.]

LEAVE TO APPEAL FROM JUDGMENT OF COUNTY COURT JUDGE IN MATTER ARISING UNDER DITCHES AND WATERCOURSES ACT, R.S.O. 1914, CH. 260—DRAINAGE REFEREE—WHEN LEAVE SHOULD BE GRANTED—QUESTION OF LAW—AMENDING ACT, 7 GEO. V. CH. 56, SEC. 5.

Re Edwards and Wynne, 14 O.W.N. 327.

LEAVE TO APPEAL FROM ORDER OF JUDGE IN CHAMBERS—RULE 507—ORDER STRIKING OUT JURY NOTICE—DISCRETION—RULE 398—MATERIALS.

Hutchinson v. City of Toronto, 15 O.W.N. 43.

LEAVE TO APPEAL TO DIVISIONAL COURT FROM ORDER OF JUDGE UNDER SEC. 81 (2) OF PUBLIC HEALTH ACT—APPLICATION UNDER SEC. 4 OF JUDGES' ORDERS ENFORCEMENT ACT—LEAVE GRANTED ON TERMS — ABATEMENT OF NUISANCE — SPEEDY HEARING.

Re Waterloo Local Board of Health; Campbell's Case, 15 O.W.N. 184.

APPEARANCE.

Judgment for default of appearance, see Judgment.

(§ 1—5)—CONDITIONAL APPEARANCE—RULE 48—SERVICE EFFECTED IN ONTARIO UPON FOREIGN COMPANY — JURISDICTION — FUTURE PROCEEDING IN FOREIGN COURT UPON JUDGMENT OBTAINED IN ONTARIO.

Ingersoll Packing Co. v. New York Central and Hudson R.R. Co., 14 O.W.N. 134. [See 14 O.W.N. 30, 42 O.L.R. 330, 13 O.W.N. 481.]

ARBITRATION.

I. IN GENERAL.
II. ARBITRATORS; UMPIRE.
III. AWARD.
IV. REVIEW OF ARBITRATION.

As to eminent domain and expropriation, see Expropriation; Damages, III L.

Annotation.

Rights of alien enemies to proceed with: 23 D.L.R. 375, 383.

Review of award; appeal; practice; 39 D.L.R. 218.

I. In general.

(§ 1—2)—LEASE—REMEDIES — ORIGINATING NOTICE—STATED CASE.

Rule 604 creates no new jurisdiction; it merely provides a mode by which the jurisdiction, conferred by sec. 16 (b) of the Ontario Judicature Act, R.S.O. 1914, ch. 56, may be exercised: the right to bring an action for a declaratory judgment is supplemented by the simple procedure of an originating notice, when the rights of the parties depend upon the construction of a deed, will, or other instrument. The Court will not, upon an originating notice under Rule 604, interpret the provisions of a lease containing a submission to arbitration, under which arbitrators have been appointed, but will leave the parties to work out their remedies under the Arbitration Act, R.S.O. 1914, ch. 65. A case may be stated by the arbitrators under sec. 29. [Ottawa Young Men's Christian Association v. City of Ottawa (1913), 29 O.L.R. 574, applied.]

Re Toronto General Trusts Corp. and McConkey, 41 O.L.R. 314. [See 43 D.L.R. 732.]

CONTRACT—ACTION FOR BREACH—STAY—ARBITRATION.

A contract for the drilling of an oil well provided for the arbitration of "any dispute, difference or question between the parties hereto . . . touching the construction, meaning or effect of these presents or anything herein contained or the rights or liabilities of the parties . . . under these presents or otherwise in relation to the premises." After an award made, the plaintiff began an action for breach of the contract. The Appellate Division of the Supreme Court of Alberta, reversing Hyndman, J., and applying sec. 5 of the Arbitration Act, ch. 6, 1909 (Alta.), stayed the action. On appeal, held, per Fitzpatrick, C.J., Anglin and Brodeur, JJ., Idington, J., dissenting, that the issues between the parties were within the scope of the agreement for arbitration and that the appeal should be dismissed. [Willesford v. Watson, L.R. 8 Ch. 473, referred to.]

Stokes-Stephens Oil Co. v. McNaught (Can.), [1918] 2 W.W.R. 122, 44 D.L.R. 682, affirming 34 D.L.R. 375, 12 A.L.R. 501.

AGREEMENT FOR SUBMISSION—ACTION—STAY OF PROCEEDINGS—TIME—ARBITRATION ACT.

The Arbitration Act, R.S.M. 1913, ch. 9, does not give to an agreement to refer disputes to arbitration the effect of depriving a party thereto of his right of action in the Courts, nor does not permit a defendant to plead such an agreement as a defence, but sec. 6 of said Act does enable him to take advantage of the agreement by an application to stay proceedings in the action, thereby compelling the plaintiff to resort to his remedy by arbitration. The application for a stay is too late if made after delivery of the defence, even where the defence challenges the jurisdiction of the Court. A clause in an agreement providing for the reference of any disputes which may arise to the decision of a foreign Court (which term in Canada includes the Court of another province) is a submission within the meaning of sec. 6 of the Arbitration Act, R.S.M. 1913, ch. 19 [Law v. Garrett, 8 Ch.D. 26, followed].

Brand v. National Life Assurance Co. (Man.), [1918] 3 W.W.R. 858.

(§ I—5)—Crown—Constitutional law.

A reference to the Crown in a provincial statute is to the Crown in right of the province only, unless the statute makes it clear that the reference is to the Crown in some other sense. Sec. 5 of the Ontario Arbitration Act does not apply to a submission by the Crown in right of the Dominion.

Gauthier v. The King, 40 D.L.R. 353 (annotated), 56 Can. S.C.R. 176, affirming 33 D.L.R. 88, 15 Can. Ex. 444.

II. Arbitrators.

(§ II — 10) — Arbitrators — Eligibility—Recusation—Grounds.

The grounds upon which arbitrators can be recused are the same as those for recusation of Judges, as art. 1439 of C.C.P. (Que.) is silent upon this subject. The enumeration of the grounds of recusation of Judges contained in art. 237, C.C.P., is not limited; others may be admitted. Art. 12 of title XXIV., of the ordinance of 1667, surrendering to the discretion of Judges the grounds on which they can be recused, has never, in effect, been repealed and is still in full force. Par. 2 of art. 237, C.C.P., decreeing that a Judge can be recused if he has an action involving a question similar to the one in dispute, ought not to be too liberall interpreted. So, there is ground for recusation although the question may not be exactly similar, if it can be determined by the same rules. The existence of a civil action between an arbitrator and a party to the arbitration agreement is ground for recusation. It is indispensable, however, that the action be between a party to the arbitration agreement and the arbitrator personally. An arbitrator cannot be recused because he acted as such for owners, strangers to the agreement, in a large number of expropriations. Chosen from among the members of the bar, according to the constitution, Judges cannot be recused on the ground of incompetence. The clerk of the Court of Appeal may be an arbitrator. The law only deprives him of the exercise of the profession of advocate. The functions of arbitrators, in an extra-judicial arbitration matter, are essentially discretionary. The arbitrator can, therefore, refuse to fulfil them without an need to give any reason for the ground of his refusal. Such explanation is only contested in a forced arbitration matter. The rules for the recusation of experts in a judicial arbitration are the same as in an extra judicial arbitration. An agreement declaring that the difference of the parties will be finally determined by "three arbitrators or experts qualified in the matter," which confuses the terms arbitrators and experts, should be interpreted in the sense that the parties intended to submit to arbitrators and not to experts. The nullity of the arbitration agreement, resulting from the obligation of all parties to sign, is covered by an express renunciation, as in the case of a municipal corporation which orders the completion of the arbitration deed without regard to the refusal of the interested parties to sign it. A Judge having power to appoint arbitrators is not compelled to choose them in a limited circle of some particular professions. So, an advocate can be named in preference to a civil engineer, or architect or contractor, when it is simply a question of fixing the damages which adjacent owners might have sustained from the alteration of the level of streets, ordered and carried out by municipal authority.

Bourdon v. City of Montreal, 54 Que. S.C. 193.

Claim against municipality—Refusal to appoint arbitrator—Jurisdiction of Judge.

A motion to appoint an arbitrator under sec. 8 of the Arbitration Act, R.S.B.C. 1911, ch. 11, on the refusal of the municipality to appoint its arbitrator upon a claim being made upon it for damages alleged to have arisen from the regrading of a certain street, refused on the ground of lack of jurisdiction.

Gold v. South Vancouver (B.C.), [1918] 3 W.W.R. 585.

(§ II—11)—Railway across land—Damages—Compensation of arbitrators—Expropriation Act (Sask.).

Canadian Northern R. Co. v. Ouseley, Chisholm and Thomson, 42 D.L.R. 772, 11 S.L.R. 282, [1918] 2 W.W.R. 1005.

(§ II — 12) — Notary — Negligence — Damages.

A notary who has been given instructions by arbitrators to receive their award and signify it to the parties within the delay in which the signification has to be made, and who negligently neglects to do so, is responsible for resulting damages.

Théberge v. Dumesnil, 42 D.L.R. 685, 54 Que. S.C. 220.

(§ II —14)—Removal of arbitrator—Appointment of new.

When what has to be done by an arbitrator can only be done with certain persons and almost necessarily must be done in a certain place, his removal to a place 2,000 miles away with no expectation of returning justifies the appointment of another arbitrator under sec. 7 of the Arbitration Act (ch. 6 .1909, Alta.).

Re McNaught and Stokes-Stephens Oil Co. (Alta.), 43 D.L.R. 7, [1918] 3 W.W.R. 337. [See 34 D.L.R. 375, 12 A.L.R. 501, 43 D.L.R. 743, 44 D.L.R. 682.]

III. Award.

(§ III—16)—Validity—Extension of time—Confirmation—Effect.

When parties to an action make a compromise by which they agree to submit their case to arbitration, and the arbitrators themselves extend the time within which they should render their award, without obtaining the consent of the parties, such award is null and void, even if the Court has received it. The receiving of the award by the Superior Court does not constitute confirmation of

such award, which can only be obtained by action brought in the ordinary manner to have the party condemned to execute it.
Cyr v. Cyr, 54 Que. S.C. 397.

(§ III—17)—Conclusiveness of award.
The award of arbitrators is final and without appeal under art. 5797 R.S.Q. 1909, unless it is established that they have exceeded their jurisdiction. [Fraser v. Fraserville, 34 D.L.R. 211, [1917] A.C. 187, followed.]
Town of Montmagny v. Letourneau, 39 D.L.R. 214 (annotated), 55 Can. S.C.R. 543.

Interpretation Act—Appeal.
According to the Interpretation Act (R.S.C 1906, ch. 1, sec. 34 (26), the Superior Court to which an appeal may be taken in British Columbia against an award of arbitrators under the Railway Act (R.S.C. 1906, ch. 37, sec. 209) is the Supreme Court of British Columbia: there is no further appeal from such Court to the Court of Appeal.
Re Kitsilano Arbitration (B.C.), 41 D.L.R. 170, [1918] 2 W.W.R. 411.

Agreement to submit dispute to—Appointment of arbitrators—Appeal from—Objection that arbitrators had not dealt with matters submitted.
Stokes-Stephens Oil Co. v. McNaught, (Alta.), 43 D.L.R. 743, [1918] 3 W.W.R. 956. [See 34 D.L.R. 375, 12 A.L.R. 501, 43 D.L.R. 7, 44 D.L.R. 682.]

Review of award—Bias.
On a review of an award made as the result of an arbitration, upon which two arbitrators and an umpire sat, it should be kept in mind that the arbitrators appointed by the parties are likely to be biased in favour of the side appointing them, and there is some authority to justify such bias, under such circumstances, Enoch & Zaretsky, [1910] 1 K.B. 327, at 334.
Ripstein v. City of Winnipeg (Man.), 44 D.L.R. 60, [1918] 3 W.W.R. 965.

Opening-up — Fresh evidence — Reasonable diligence.
Before an award can be opened because of the discovery of fresh evidence after the award it must be shewn that there was reasonable diligence on the part of the applicant prior to the award to discover such evidence [Burnard v. Wainwright, 19 L.J.Q.B. 423; Re Keighley & Bryan, Durant & Co., [1893] 1 Q.B. 405, distinguished].
Gorgnigiani v. Welch (B.C.), [1918] 3 W.W.R. 797.

IV. Review of arbitration.
Appeals from awards, see Appeal.

(§ IV—44)—Judge directing execution—Award as judgment.
Sec. 13 of the Arbitration Act (ch. 6, 1909, Alta.) does not authorise a Judge to direct execution, on an award, where the evident intention of the arbitrators was not to determine how much was due but the basis upon which the amount could be determined. All that the section authorises is the granting of leave by a Judge for the award to be treated as a judgment for the purpose of enforcement.
Re McNaught and Stokes-Stephens Oil Co. (Alta.), 43 D.L.R. 7, [1918] 3 W.W.R. 337. [See 34 D.L.R. 375, 12 A.L.R. 501, 43 D.L.R. 743, 44 D.L.R. 682.]

ARCHITECT.
As to building contracts, see Contracts.

Annotation.
Duty to employer: 14 D.L.R. 402.

ARMY AND NAVY.
See Military Law.
War Relief Acts, see Moratorium.

ARREST.
I. For crime.
A. In general.
B. Without warrant.
II. In civil cases.

See also False Imprisonment; Malicious Prosecution; Criminal Law.

Annotation.
Arrest and detention of alien enemies: 23 D.L.R. 375, 383.

I. For crime.
(§ I A — 1) — Sufficiency of warrant—Description.
Although the description in a warrant of arrest be not exact it is sufficient if there could be no failure to identify the person to be arrested.
Re Wade (N.B.), 38 D.L.R. 287.

Deputy clerk of peace—Powers.
A clerk of the peace has the right, under R.S.Q. art. 3505, to appoint one deputy only, with all the powers he himself has; all deputies whom he appoints subsequently to the first have not these powers; and accusations which the latter receive under oath, and the orders for arrest which are issued under such accusations, are illegal and void.
Villeneuve v. Primeau, 54 Que. S.C. 82.

(§ I A—2)—Arresting officer also informant.
An arrest under warrant in a criminal matter may be made by the same officer who laid the information, but it is undesirable that the informing officer should act if he has any personal feeling against the accused or any monetary interest in the subject matter of the charge.
Rex v. Harrison (B.C.), 29 Can. Cr. Cas. 420.

(§ I A—4)—Illegal detention by police.
An arrest in criminal proceedings is not invalidated by the circumstance that at the time of the arrest the accused is already in the custody of the police under an unlawful arrest or detention. A subsequent valid arrest can be made without a previous discharge from the unlawful custody.

Rex v. Harrison (B.C.), 29 Can. Cr. Cas. 420.

B. Without warrant.

(§ I B—9)—Liquor law.

Neither Cr. Code sec. 35, nor Cr. Code sec. 648, applies to authorize a peace officer to arrest without warrant a person whom he finds committing an offence against a provincial statute which itself provides a penalty and is therefore not within Cr. Code, sec. 164, as to wilful disobedience of provincial statutes. [R. v. McMurrer, 18 Can. Cr. Cas. 385, approved.]

Rex v. Pollard, 39 D.L.R. 111, 29 Can. Cr. Cas. 35, 13 A.L.R. 157.

II. In civil cases.

(§ II B — 21) — Capias — Arrest of Debtor's Act—Affidavit.

A defendant arrested under a writ of capias for a money claim who makes a deposit in lieu of bail and obtains his release under the Arrest of Debtors Act (Con. stats. N.B. 1903, ch. 130, sec. 5) is entitled to a return of the deposit upon an order setting aside the arrest because of the invalidity of the affidavit to hold to bail. [MacAuley v. Jacobson (1906), 37 N.B.R. 537, distinguished.]

Peters v. Charlot, 39 D.L.R. 407, 45 N.B.R. 314.

ASSAULT AND BATTERY.

(§ I—5)—Of peace officer—Consent to summary trial.

A charge of assaulting a peace officer acting in the discharge of his duty is subject to the provisions of Part XVI. (summary trials) and a magistrate has no jurisdiction to try it without the consent of the accused under Cr. Code, sec. 778, in provinces where such consent is not dispensed with by the Code.

Ex parte Carroll (N.B.), 41 D.L.R. 196, 29 Can. Cr. Cas. 213.

ASSESSMENT.

See Taxes; Schools; Municipal Corporations.

ASSIGNMENT.

I. What assignable; validity.
II. Equitable assignment; orders.
III. Rights and liabilities of parties.

For creditors, see Assignment for Creditors.

Of interest in contract for sale of lands, see Vendor and Purchaser; Land Titles; Mortgage.

Annotation.

Equitable assignments of choses in action: 10 D.L.R. 277.

I. What assignable; validity.

(§ I—2)—Chose in action—"Absolute" assignment—Action—Parties—Adding assignee.

An assignment of a chose in action which, on its face purport to be given by way of security or on certain trusts; if the assignment purports to pass the assignor's entire title to the chose in action, though expressly by way of mortgage (passing the legal title), it is nevertheless absolute; if the assignment, whatever its form, purports to charge the assignor's interest, while leaving the title to that interest in the assignor, it is an assignment by way of charge only. [Hughes v. Pump House Hotel Co., [1902] 2 K.B. 190 and Wilton v. Rochester German Underwriters Agency Co., 11 A.L.R. 574, followed.] In an action upon a chose in action by the assignor thereof, if both the assignor and assignee are bound by the result, any difficulty on the score of parties is fully met. [Wilton v. Rochester German Underwriters Agency Co., supra, distinguished.] An alleged compromise as to the amount of a claim for insurance moneys held not to have been concluded.

followed by notice, would entitle the assignee to sue in his own name and (ordinarily) dis-entitle the assignor to sue in his name, may

Taylor v. Equitable Fire & Marine Ins. Co., 13 A.L.R. 58, [1918] 1 W.W.R. 676, reversing [1918] 1 W.W.R. 277.

II. Equitable assignment; orders.

(See previous Annual Digests.)

III. Rights and liabilities of parties.

(§ III—25)—Of draft—Validity—Registration — Priorities — Security to bank — Garnishment — Bank Act — Preference.

Imperial Bank of Canada v. Western Supply & Equipment Co. (Alta.), 39 D.L.R. 803.

(§ III—30)—Notice of assignment—Judicature Act.

An assignment of an agreement to supply a corporation with electric power and light for a term of years is unenforceable until notice of the assignment is given in accordance with sec. 19 (6) of the New Brunswick Judicature Act, 1909.

Woodstock Electric R. L. & P. Co. v. Dominion Tanneries, 40 D.L.R. 643, 45 N.B.R. 408.

(§ III—33) — Vendor and purchaser — Assignment—Rights of assignee.

A purchaser under an agreement of sale of land, who defaults under circumstances which justify the vendor in believing that the contract has been abandoned, cannot by making a merely speculative assignment of his interest place his assignee in any better position. [See annotation, 14 D.L.R. 503.]

Wilson v. Patterson (Alta.), 39 D.L.R. 642, [1918] 1 W.W.R. 999.

ASSIGNMENTS FOR CREDITORS.

I. What constitutes an assignment.
II. Construction and effect of assignment.
III. Assignee or trustee.
  A. In general.
  B. Rights and powers.
  C. Liabilities.
IV. Rights and liabilities of assignee's attorney.

V. Validity; taking effect.
VI. Property included.
VII. Preferences by insolvent.
A. In general.
B. Validity of.
VIII. Rights, duties and liabilities of creditors; priority and release of claims.
A. In general.
B. Release of claims.
IX. Liability of assignor.

Insolvency and winding-up of companies, see Companies; Banks.

Annotation.

Rights and powers of assignee: 14 D.L.R. 503.

I. What constitutes an assignment.

(§ I—1)—Litigious claim.

Litigation between a creditor and his debtor should be submitted to the Court by the ordinary procedure, and the creditor is not justified to force the debtor to make a judicial abandonment of his property when this latter sets up a serious defence against his claim.

Rumlos v. Sherwin, 54 Que. S.C. 366.

Trader—Clerk or agent transacting business—Liability.

Although a son, employed as clerk and agent by his father, and in his own name collects debts, makes claims, and purchases and does all the commercial business of his father, he is not for that reason a trader; and a creditor cannot make an application for an abandonment by him of his property. But such agent is subject to art. 1716, C.C. (Que.), and personally liable to third parties.

Major v. Scarborough, 24 Rev. Leg. 461.

II. Construction and effect of assignment.

(See previous Annual Digests.)

III. Assignee or trustee.

A. In general.

(§ III A—10)—Appointment of curator—Creditor.

There is nothing to prevent the appointment as curator of a creditor whose debtor has made a judicial abandonment of his property for the benefit of his creditors. A curator in an abandonment of property is the agent both of the bankrupt and of the creditors.

Gauthier v. Patenaude, 54 Que. S.C. 101. [See 19 Que. P.R. 470.]

Right of endorser of note.

The endorser of a note, which he has not paid, cannot file a claim for the note nor vote for the appointment of a curator, when the holder of the note himself has filed a claim for the note. One who once voted for a curator cannot later cancel his vote and give it to another candidate. A creditor has the right of becoming its curator.

Gauthier v. Laviolette, 19 Que. P.R. 470. [See 54 Que. S.C. 101.]

B. Rights and powers.

(§ III B—15)—Pledge of immovables—Sale by curator.

If real estate is given in pledge by traders who later become insolvent, their curator cannot obtain permission to sell the said properties without first indemnifying the creditor who holds the pledge.

Leger v. Turcotte, 19 Que. P.R. 214.

Contract—Sale of debts—Warranty.

A sale en bloc, by a curator of the debts of a bankrupt, with a stipulation that there was no warranty as to the value or existence of such debts, and relinquishment by the purchaser of all recourse, constitutes an aleatory contract, and is not subject to the provisions of art. 1576, C.C. (Que.). In such case there is no recourse in warranty or for reduction of price if some of the debts included in the estate are found to have no actual existence, or are extinguished by prescription or compensation.

La Compagnie Beaudoin v. Larue, 53 Que. S.C. 298.

Curator—Costs—Insurance policy.

The curator in a judicial abandonment of property who receives a fee equivalent to 5% of the value of the insolvent's goods has no right to charge additional fees for notices to creditors for the preparation of the dividend sheet, for each claim, or any other special fee for his various acts of administration. Neither can he reimburse himself for the insurance premium paid by him upon the guarantee policy which he furnished to the creditors instead of security.

Daoust v. Houde, 53 Que. S.C. 64.

Curator—Costs.

There is a custom generally followed, by which all the services of a curator in a judicial abandonment of property are not paid according to the time that the curator has spent on it, but are paid by a commission of 5% upon the moneys realized by the sale of the movable of the bankrupt, and of 2½% upon moneys arising from the sale of the immovables; nevertheless, where there was an extraordinary amount of work, or when the commission would be very trifling or overstated and clearly unjust, the Court may grant an additional fee. The costs of the curator incurred in the sole interest of the hypothecary creditors with respect to the sale of real property hypothecated in their favour, ought to be borne by the latter and not by all the creditors or by the ordinary creditors. A curator cannot claim a fee for services rendered before his nomination as substitute for the judicial guardian, which, according to custom, is never paid.

Moscovitch and Middlton-Hope v. Forget, 53 Que. S.C. 99.

(§ III B—25)—Action—Authorization—Notice.

A curator has the right, when authorized by the inspector and by judgment of a Judge of the Superior Court, to take action against

a debtor of the estate for which the curator is acting, and likewise to contest the insolvent's statement, without being bound to give notice of his petition to act against such insolvent or debtor.

Re Cohen and Turgeon, 24 Rev. de Jur. 31.

C. LIABILITIES.

(§ III C—30)—SALE BY CURATOR—WARRANTY.

A curator named in a judicial abandonment of property who, duly authorized, sells anything forming part of the assets of the bankrupt, with warranty, is not personally responsible if the purchaser is disturbed in his possession of the thing.

Savard v. Trudel, 53 Que. S.C. 515.

IV. Rights and liabilities of assignee's attorney.

(See previous Annual Digests.)

V. Validity; taking effect.

(§ V—40)—AUTHORIZATION TO CURATOR—PETITION IN REVOCATION.

In a doubtful case, and in view of art. 890, C.C.P. (Que.), an insolvent may file a petition in revocation of the judgment authorizing the curator to contest his statement.

Cohen v. Turgeon, 19 Que. P.R. 368.

(§ V—44)—SCHEDULE—EXTENSION OF TIME—PETITION IN REVOCATION.

An insolvent cannot, by way of a petition in revocation, complain of a final judgment maintaining a contestation of his statement by alleging that the curator's petitions to be allowed to contest the statement and to extend the delay of contestation have not been served on the insolvent. A fortiori, a petition to revoke the judgment cannot be received when the grounds on which it is based have already been submitted to the Courts seized of the case. The delay for attacking, by way of petition in revocation, preliminary and interlocutory judgments begins to run from the date of the delivery of the judgments and not from the date of the final judgment.

Krauss v. Michaud, 20 Que. P.R. 1.

VI. Property included.

(See previous Annual Digests.)

VII. Preferences by insolvent.

A. IN GENERAL.

(§ VII A—55)—ASSIGNMENTS AND PREFERENCES ACT—MORTGAGE—ACTION TO SET ASIDE—PARTIES.

Mortimer v. Fesserton Timber Co., 39 D.L.R. 781, 40 O.L.R. 86.

LEASE—ASSIGNMENT—CHATTEL MORTGAGE — PRIORITIES — BUILDING — ASSIGNMENTS AND PREFERENCES ACT—BONA FIDES.

E. (a trader) was the lessee of land for 10 years, under an instrument, executed in 1909, purporting to be a lease made pursuant to the Short Forms of Leases Act, with a reservation in favour of the lessor of all mines and minerals on and under the land with a right to work the same, and containing a provision that the lessor might at any time, on giving the lessee 6 months' notice, determine the term, whereupon the lessor should pay to the lessee the fair value of any building erected on the land. E. erected upon the premises a brick building with a cement foundation. In 1913, E., being indebted to the plaintiff S., executed in his favour a deed of trust or assignment of her interest in the building, as security for the payment of her indebtedness, present and future, to him. Notwithstanding this assignment, E., in 1916, executed in favour of the defendant a chattel mortgage upon her interest in the building, describing it as a building situated on land belonging to the lessor. Subsequently E. made an assignment, under the Assignments and Preferences Act, for the general benefit of creditors, to the plaintiff M. In this action (brought within 60 days after the making of the chattel mortgage) the plaintiff S. asserted the priority of his security to the defendant's chattel mortgage, and both plaintiffs asserted that the chattel mortgage was void as against creditors: Held (Riddell, J., expressing no opinion, and Ferguson, J.A., dissenting), that the building when erected became part of the land and passed to the lessor; it was not intended to be a trade-fixture or a chattel that might be removed; the instrument under which E. took an interest in the land was a lease, and not a license; the chattel mortgage conveyed nothing to the defendant; and any interest which E. had under the lease passed to M., subject to the claim of S. upon his security. Judgment of Masten, J., the trial Judge, upon this branch of the case, affirmed. Upon the second branch of the case, the trial Judge found that the sum of $2,500 was actually advanced by the defendant to E. at the time she made the chattel mortgage; he also found facts which brought the case within sec. 5 (1) of the Act, unless the advance was made bonâ fide within sec. 6 (1); but he did not find that the defendant took the impeached security with intent to defeat, hinder, or delay creditors, and he did not find that the security was not given in consideration of a present actual bonâ fide payment in money: Held (Ferguson, J.A., dissenting), that the express findings were sufficient to negative the bona fides of the transaction, and that the defendant's security upon the second ground also, had been successfully impeached.

Struthers v. Chamandy, 42 O.L.R. 508.

SALE OF GOODS BELONGING TO INSOLVENT ESTATE BY ASSIGNEE TO CREDITOR—INSPECTOR OF ESTATE—CONSTRUCTIVE TRUSTEE—RESALE AT PROFIT—RIGHT OF ASSIGNEE TO ACCOUNT OF PROFITS—PROOF THAT GOODS SOLD AND DELIVERED AND PURCHASERS SOLVENT—DEFENCE IN LAW—INABILITY OF CREDITOR-INSPECTOR TO RECOVER FROM PURCHASERS.

Wade v. James, 15 O.W.N. 77, reversed in 15 O.W.N. 424.

CREDITORS OF INSOLVENT RECEIVING PAYMENT IN FULL—INTENT TO DELAY OR PREJUDICE OTHER CREDITORS—EVIDENCE—ONUS—FAILURE TO SATISFY—PRESSURE—SIXTY-DAY PRESUMPTION—FINDING THAT TRANSACTION DID NOT AMOUNT TO ASSIGNMENT OR TRANSFER OF GOODS OR PROPERTY—CLAIM TO RECOVER VALUE OF GOODS—ASSIGNEE FOR BENEFIT OF CREDITORS.

Clarkson v. Bonner-Worth Co., 14 O.W.N. 272, affirmed in 15 O.W.N. 390.

ASSIGNMENT—PARTNERSHIP.

Defendant endorsed a firm's note at three months for $500 which fell due August 10, 1915. On July 21, 1915, defendant obtained goods from firm's store to the amount of $511.75, computed at retail price. Defendant gave his cheque for $500 bearing date July 21, 1915, to one of the partners, with which cheque the partner paid at the bank the note on which defendant was endorser. One of the partners executed a deed of assignment for the benefit of his creditors to the plaintiff of all his individual and partnership property on August 4, 1915. The other partner executed a deed of assignment for the benefit of his creditors to the plaintiff of all his individual and partnership property on August 14, 1915. Held, in an action brought by the assignee to set aside the transfer or conveyance of the goods to the defendant, that the plaintiff by virtue of the assignments to him by each partner of his individual and partnership property, had sufficient interest and status to maintain this suit. Query, whether individual assignments can be deemed to be an assignment of the debtor firm within the meaning of sub-sec. 4 of sec. 2 of the Assignments and Preferences Act, C.S. 1903, ch. 141. Held, also, that transfer to the defendant was made when defendant was in insolvent circumstances or on the eve of insolvency, and was made with intent to give the defendant an unjust preference over the other creditors, and is void under the Act respecting Assignments and Preferences by Insolvent Persons, C.S. 1903, ch. 141; that the amount of the claims, proved according to the statute C.S. 1903, ch. 141, and filed with the assignee, was relevant and admissible testimony as to the solvency or insolvency of the firm.

Fleetwood v. Welton, 44 N.B.R. 318.

VIII. Rights, duties and liabilities of creditors; priority and release of claims.

A. IN GENERAL.

(§ VIII A—65)—SECURED CLAIM—MORTGAGE—STATEMENT OF VALUE—ASSIGNMENTS AND PREFERENCES ACT.

Under the Assignments and Preferences Act (R.S.O. 1897, ch. 147, sec. 20 (4)) the creditor is not required to put a specified value on the security in the claim which he files with the assignee; this may be done by a separate document; the delivery to the assignee of a simple statement that he puts a stated value on his security is sufficient compliance with the section. If a secured creditor and the assignee meet and arrive at an agreement as to the value of the security held by the creditor, and the assignee does not desire to be given an opportunity of taking over the security in the formal manner for which sec. 20 (4) provides, he may waive his right to have a specified value put on the security by the creditor and consent to the retention of it at the value which he and the creditor have agreed that it was at all events when the assignee does this under the authority of the creditors. It being known to the assignee and to the creditors that a mortgagee is a secured creditor, they must be taken in appointing him an inspector to have intended that he should act as inspector only in respect of matters outside of those in which he has duties to perform under sec. 20 (4).

Taylor v. Davies, 41 D.L.R. 510, 41 O.L.R. 403, reversing 39 O.L.R. 205.

CLAIMS—AMENDMENT—ESTOPPEL.

A creditor having amended his claim and valued his securities against an insolvent debtor, and such valuation having been acquiesced in, is estopped from subsequently setting up any preferential claim not set out in the amended claim.

Williams Machinery Co. v. Graham, 43 D.L.R. 437, 57 Can. S.C.R. 229, [1918] 3 W.W.R. 597, affirming 39 D.L.R. 140, 25 B.C.R. 284.

PRIOR SEIZURE BY SHERIFF—SALE OF GOODS BY ASSIGNEE—POSSESSION—TITLE OF PURCHASER—ASSIGNMENTS ACT — NOTICE.

Under sec. 16 of the Assignments Act, failure to publish the notice of an assignment for the benefit of creditors directed by sec. 12 of the Act does not invalidate the assignment. Failure to furnish the sheriff, pursuant to sec. 12 of the Assignments Act, with a copy of an assignment for the benefit of creditors does not invalidate the assignment or a sale by the assignee of the goods assigned, where, at any rate, the assignee does not know the sheriff has made a seizure and neither the sheriff nor any one on his behalf is in actual possession. The purchaser of goods from an assignee for the benefit of creditors, neither the assignee nor the purchaser knowing of a seizure thereof prior to the assignment, held to have obtained a good title to the goods notwithstanding the absence of publication of notice of the assignment and the failure to furnish the sheriff with a copy of the assignment.

Seinbaine v. Christopherson and Sask. Guarantee & Fidelity Co., [1918] 3 W.W.R. 174, 11 S.L.R. 385.

PREFERRED CLAIMS — "JUDGMENT" — ALIMONY DECREE.

On an assignment under the Creditors' Trust Deeds Act, R.S.B.C. ch. 13, a decree for alimony does not give the assignor's wife a preference over his other unsecured creditors. A decree for alimony is a "judgment" of the

Supreme Court and is, therefore, covered by the word "judgments" in sec. 14 of the Creditors' Trust Deeds Act.

Francis v. Wilkerson, [1918] 2 W.W.R. 956, affirming 25 B.C.R. 132.

DISTRIBUTION—DIVIDEND SHEET—COSTS OF CURATOR—PRIVILEGED CREDITOR—DEFICIT.

The dividend sheet prepared by a curator of an insolvent estate, for the distribution of the assets among the creditors, must establish the amount due each one of them according to the order, privilege and amount of each one's respective claim; and should that memorandum shew a deficit, it must name the creditors on whom it should be assessed. In such a memorandum the curator cannot collocate himself by preference to a privileged creditor for his own travelling and boarding expenses, for his inventory costs, his fees of inspection and delivery of the business and for his commission on the collection of rents and sale price of goods.

Sahekik v. Duhamel, 53 Que. S.C. 61.

COSTS—PRIVILEGED CREDITOR—APPORTIONMENT.

If a curator in a judicial abandonment of property has been condemned to pay the costs of contestation of his dividend sheet, and that, in consequence of the payment of these costs, a privileged creditor, who would have been paid his debt in full, is not so paid, the court may order the curator to deduct proportionately from each creditor who produces a claim, an amount sufficient to pay the privileged creditor in full.

Lester v. Turcotte, 53 Que. S.C. 541.

CLAIMS — SIMPLE CONTRACT CREDITOR — CURATOR'S FEES — CONTINUATION OF BUSINESS.

In a judicial abandonment of property, the costs of a seizure, made the same day but later than another, and under a judgment which was not given the same day, are not privileged. (2) A simple contract creditor has a right to contest a dividend sheet prepared by the curator in a judicial abandonment of property. (3) The curator in a judicial abandonment of property has not the right, under a simple resolution of the inspectors and without the authorization of a Judge, to continue the trade of the bankrupt; nevertheless, if such business has turned out to be for the benefit of the creditors in general, the Court, recognizing the accomplished fact, will not void the transaction. (4) A curator who continues the business of the bankrupt has no right to pay an account for merchanise sold and delivered before the judicial abandonment of property. (5) A curator has no right to ask a fee for his steps and proceedings towards making a compromise between the debtor and his creditors, if such compromise is not authorized by the Judge, and especially if he has brought no benefit to the creditors.

Chagnon v. Rameau, 53 Que. S.C. 279.

CLAIMS—SECURED DEBT—DIVIDEND SHEET.

A creditor, in producing his claim in a judicial abandonment of property under the authority of C.C.P., is not bound, as under the old bankruptcy law and Dominion Winding-up Act, to state his securities and specify them in his claim. A Court, in a contestation of a dividend sheet, cannot admit a fact which has not been pleaded. A final dividend sheet cannot be annulled and set aside because the curator ought to have prepared a first dividend sheet.

Morency v. Gagnon, 24 Rev. Leg. 92.

IX. Liability of assignor.

(See previous Annual Digests.)

ASSOCIATIONS.

See Benevolent Societies; Charities; Religious Institutions; Partnership; Companies.

ASSUMPTION OF RISK.

See Master and Servant.

ATTACHMENT.

I. WHEN LIES.
A. In general.
B. On what claims.
C. By or against non-residents or foreign corporations.
D. For fraud.
II. INTEREST ACQUIRED; LIEN; PRIORITY.
A. In general.
B. Lien; priority.
III. PROCEDURE.
A. In general; affidavits; petition, etc.
B. Bonds, liabilit on.
C. Dissolution; dismissal; setting aside.

See also Garnishment; Levy and Seizure; Execution; Judicial Sale.

Attachment for contempt, see Contempt.

Arrest in civil cases, see Arrest.

I. When lies.

(See previous Annual Digests.)

II. Interest acquired; lien; priority.

(See previous Annual Digests.)

III. Procedure.

A. IN GENERAL; AFFIDAVITS; PETITION, ETC.

(§ III A—45)—PRACTICE—KING'S BENCH ACT.

If the affidavits filed on an application for an order for attachment against goods and chattels fully comply with rr. 814 and 815 of the King's Bench Act, the question of the liability of the defendant for the debt sued for will not be inquired into on motion in Chambers to set the order aside, notwithstanding that the defendant's denial of the liability is supported by statements made by officers of the plaintiff company on their cross-examination upon their affidavits filed. Such question must be left to be decided by the Judge at the trial of the action. An order for attachment will not be set aside because the affidavits upon which it was made do not

disclose matters afterwards appearing in statements made by officers of the plaintiff company under cross-examination on the affidavits, although it is contended that, if such matters had been disclosed, the Judge would probably have refused the order. [Newton v. Bergman (1901), 13 Man. L.R. 563, distinguished.]

Paulin v. Freinstein, 28 Man. L.R. 436.

OWNERSHIP—PAYMENT IN COURT.

When an attachment is issed by a plaintiff who is not the owner of the thing attached, the Court, in maintaining the action, may order the defendant to deposit in Court, instead of paying it to the plaintiff, the sum which he is condemned to pay, on default of returning the thing claimed.

Charron v. Walker, 54 Que. S.C. 439.

ATTESTATION.

Of wills, see Wills, I.

ATTORNEY-GENERAL.

As necessary party, see Parties.

ATTORNEYS.

See Solicitors.

AUTOMOBILES.

I. IN GENERAL.
II. PUBLIC REGULATION AND CONTROL; LICENSE.
III. INDIVIDUAL RIGHTS AND LIABILITIES.
A. In general.
B. Duty of operator; negligence.
C. Responsibility of owner when car operated by another.
D. Duty and liability to operator or person using.
IV. AUTOMOBILES FOR HIRE.
V. GARAGE.
A. In general.
B. Right of proprietor to lien.
C. Licensing of garage.
D. Duty to customer.

Annotation.

Review of Canadian and English decisions on law of motor vehicles: 39 D.L.R. 4.

I. In general.

See Negligence.

II. Public regulation and control; license.

(See previous Annual Digests.)

III. Individual rights and liabilities.

B. DUTY OF OPERATOR; NEGLIGENCE.

See also Negligence.

(§ III B—180)—BORROWER—NEGLIGENCE—DAMAGES.

A borrower is not responsible for ordinary wear and tear, but is for negligence; receiving property in good condition and returning it in a damaged condition is prima facie evidence of negligence. [See annotation 39 D.L.R. 1.]

Bijou Motor Parlors v. Keel (Alta.), 39 D.L.R. 410, [1918] 1 W.W.R. 706.

LIABILITY OF INVITEE—ACCOMPLICE.

One knowing that a chauffeur has taken without permission his employer's automobile, who gets in it with him on his invitation to take a drive around, becomes his accomplice and is responsible for damages sustained as the result of an accident.

Galibert v. Vaillancourt, 53 Que. S.C. 521.

BURDEN OF PROOF.

In an action for damages for personal injuries caused by the defendant's automobile, held, that the defendant had failed to satisfy the onus cast upon him by the Motor Vehicle Act, ch. 131, R.S.M. 1913, of proving that the damage suffered by the plaintiff did not result from the defendant's negligence.

Lechiw v. Sewrey (Man.), [1918] 2 W.W.R. 386.

COLLISION—PRESUMPTION.

Where in an action for damages caused by a collision between an automobile and a carriage it is impossible for the Court to establish which of the parties was to blame, the responsibility falls on the owner of the automobile, by reason of the presumption created by 3 Geo. V., ch. 19, sec. 2.

Guilbeault v. Loomis, 24 Rev. Leg. 510.

LAW OF ROAD—CROSSINGS.

The proprietor and chauffeur of a motor vehicle are guilty of negligence and responsible in damages when violating the law respecting motor vehicles, to wit: (a) R.S.Q. 1909, art. 1420, enacting that "when approaching a sharp angle, turn or curve, or a steep descent in the highway, or intersecting highways and crossings, the speed of the motor vehicle shall be reduced to four miles per hour, and signal shall be given upon approaching angle, turn or curve in a highway or the intersections of two streets;" (b) art. 1420b of the same statutes amended, enacting that "when a motor vehicle meets or overtakes a street car which is stationary, for the purpose of taking on or discharging passengers, the motor vehicle shall not pass the car, on the side on which passengers get on or off, until the car has started and any passengers who have alighted shall have reached the side of the street;" (c) the by-law of the City of Montreal No. 450, art. 14a, ordering that, "every driver of vehicle going in the same direction as a street car shall, when such car stops, also stop his vehicle at a distance of at least ten feet from said car, and shall keep such vehicle at a standstill, until the said car has been again set in motion."

Carson v. Raifman, 27 Que. K.B. 337.

DRIVER FOLLOWING VEHICLE—RULE OF ROAD—SIGNALS.

Where the driver of an automobile following a vehicle acts contrary to the provisions of R.S.Q., art. 1415, by passing to the right instead of the left of the vehicle, when there was room to the left more than sufficient to pass without accident, an accident occurring thereby is attributable solely to the fault of the driver, particularly where the automobile

had no horn, as required by art. 1417, R.S.Q., to warn the driver of the carriage that he wished to pass, and after the accident he continued on his way contrary to art. 1321.

Taillon v. Cote, 24 Rev. de Jur. 80.

(§ III B—200)—Defective highway—Primary negligence—Registration—Number plates.

Operating a motor car in violation of the statutory requirements as to registration and number plates will bar recovery of any damages sustained by reason of defects in the highway; under such circumstances, a municipal corporation owes no duty to the driver or owner of the car except to refrain from wilful or malicious injury.

Etter v. City of Saskatoon, 39 D.L.R. 1 (annotated), 10 S.L.R. 415.

(§ III B—220)—Motor-truck—Injury to cyclist.

The plaintiff was riding a bicycle westerly, on the southerly side of Hastings Street in Vancouver, and about to cross Cambie Street, when the defendant's motor-truck, coming easterly on the north side of Hastings Street, was about to turn and go southerly up Cambie Street. The plaintiff had ample time to cross Cambie Street in front of the motor-truck but, while crossing, his wheel skidded and he fell. The driver of the motor-truck saw him fall, but was not able to stop until it rested on the plaintiff's leg and fractured it. The driver did not sound his horn when turning the corner. In an action for damages judgment was given for the plaintiff. Held, on appeal, affirming the decision of McInnes, Co.J. (Macdonald, C.J.A., dissenting), that there was evidence upon which the learned Judge below might reasonably find that the driver of the motor-truck was negligent and the appeal should be dismissed.

Bell v. Johnston, 25 B.C.R. 82, [1918] 2 W.W.R. 549.

(§ III B—221) — Collision — Ultimate negligence.

An action for damages for injuries caused by a collision between motor vehicles is properly dismissed, where the answers of the jury indicate that each party was to blame and there is nothing to suggest that the respondent was guilty of ultimate negligence. [See annotations 31 D.L.R. 370, 39 D.L.R. 4.]

Judson v. Haines, 43 D.L.R. 227, 42 O.L.R. 629.

(§ III B—225)—Duty when approaching horses.

Sec. 16 (1) of the Motor Vehicles Act, R.S.O. 1914, ch. 207, that "every person having the control or charge of a motor vehicle . . . shall not approach such horse . . . at a greater speed than 7 miles an hour" is a specific and definite prohibition, and does not depend upon the knowledge or belief of the driver of the motor vehicle.

Bradshaw v. Conlin, 39 D.L.R. 86, 40 O.L.R. 494.

(§ III B—253)—Rights of pedestrians.

Pedestrians have the same rights in the use of public streets as have drivers of automobiles, and the latter must exercise the necessary care and prudence to avoid any accident, and not violate the rights which pedestrians have under the common law.

Legault v. Kander, 24 Rev. de Jur. 143.

Passenger alighting from street car—Negligence — Contributory negligence.

Sec. 7 of the Vehicles Act, ch. 38, 1912, which provides that "every motor vehicle shall be equipped . . . with a suitable horn or other device which shall be sounded only whenever it shall be reasonably necessary to notify pedestrians or others of the approach of such vehicle," imposes on the driver of a motor car the duty of sounding his horn when he sees a passenger alighting from a street car in front of him and where, because of his failure to so sound his horn, the passenger is injured and the accident would not have happened had the horn been sounded, the passenger is entitled to damages even though he did not look in the direction of the motor car before attempting to cross from the street car to the sidewalk [B.C. Elec. R. Co. v. Loach, 23 D.L.R. 4, [1916] 1 A.C. 719, and later cases referred to].

Coe v. Mayberry (Sask.), [1918] 3 W.W.R. 382, 11 S.L.R. 425.

(§ III B—260)—As to sidewalks.

The Nova Scotia Motor Vehicles Act, 1914, does not supersede a municipal ordinance imposing penalties for driving a motor car along a city sidewalk.

Rex v. Archibald (N.S.), 29 Can. Cr. Cas. 146.

(§ III B—266)—Towing—Caution.

An automobile driver who, towing another machine with a rope, leaving a certain distance between the two machines, is bound to take increased precautions; he should take the necessary means to inform other vehicles of the danger from the tow rope.

Laberge v. La Compagnie des Tramways de Montréal, 24 Rev. Leg. 133.

C. Responsibility of owner when car operated by another.

(§ III C—300)—Chauffeur taking car to garage.

A chauffeur who on taking a car back to the garage in accordance with his instructions, after his master has finished using it, finds the garage locked and goes for the key in order to put the car in the garage, is in the employ of the master while going for the key and the master is liable for his negligence. [See annotation, 39 D.L.R. 4.]

Poplis v. Chaput, 40 D.L.R. 667, 53 Que. S.C. 440.

SALESMAN—DISPLAYING CAR—"MECHANIC"—"CHAUFFEUR."

An automobile salesman who displays his car by operating it, and having effected a sale, assists the purchaser in locating some trouble, by going out with him and operating the car for a time, is not a "mechanic" within the meaning of the word as used in the definition of "chauffeur" in sec. 2 (3) of the Motor Vehicle Act (Alta. stats. 1911-12, ch. 6). [See annotation 39 D.L.R. 4.]

Hutchinson v. Shearer, 41 D.L.R. 418, 13 A.L.R. 309, [1918] 2 W.W.R. 480.

CAR USED BY SERVANT — NEGLIGENCE — BURDEN OF PROOF.

Where a grocer, owner of an automobile, employs a young man to deliver his goods with such machine, he is responsible for damages caused by the fault of his driver. It is negligence for the owner of an automobile not to provide it with a syren, which the driver could make use of when necessary. When an automobile causes an injury to any one in a public road, the burden of proof that the injury is not due to the negligence of the owner or of the driver is upon the latter.

Dussault v. Chartrand, 54 Que. S.C. 488.

In an accident caused by an automobile truck, the burden of proof that the loss and damages sustained did not arise through the negligence or improper conduct of the driver of the truck, is upon the owner of the machine.

Babinsky v. Wilson, 24 Rev. Leg. 433.

D. DUTY AND LIABILITY TO OPERATOR.

(§ III D—350)—CAUSE OF ACCIDENT—SPEED—FINDINGS OF JURY.

In an action for damages for injury to an automobile on a highway the findings of the jury should not be disturbed although they have not directly indicated the connection between the negligence found and the accident, if they did on the evidence reasonably draw the inference that the effective cause of the accident was the "excessive rate of speed," and that the plaintiff was not guilty of contributory negligence. [See annotations, 1 D.L.R. 783, 39 D.L.R. 4.]

Gallagher v. Toronto R. Co., 40 D.L.R. 114, 41 O.L.R. 143.

IV. Automobiles for hire.

(See previous Annual Digests.)

V. Garage.

A. IN GENERAL.

(§ V A—450)—ATTACHMENT—EXECUTION—LANDLORD AND TENANT.

One placing an automobile in a garage to be sold, at a rent of $5 a month, payable to the keeper of the garage, who is a tenant, will be deemed a sub-tenant to the owner of the building in which the garage is situated. So that, if the latter issues execution by way of security against his tenant and seizes the automobile, the owner must, in order to obtain his machine, pay the amount of the rent which he owed at the time of the seizure.

Marcotte v. Auto Garage Ltd., 53 Que. S.C. 77.

RIGHTS OF GARAGE KEEPER—JUDGMENT—EXECUTION—OWNER OF MACHINE.

A garage keeper receiving an automobile from one who is not the owner, who makes repairs upon it and keeps it in his garage, cannot, after obtaining judgment for his services, seize the automobile in execution; he could only do so in execution of a judgment against the owner of the automobile in a suit brought against him.

Rapid Motor Co. v. Dagenais, 24 Rev. de Jur. 101.

C. LICENSING OF GARAGE.

(§ V C — 470)— LICENSE — MEANING OF "GARAGE."

A "garage" under the Quebec Motor Vehicles Law, R.S. Que. 1909, art. 1402b (added by Quebec statutes 1916, ch. 21), for which a license is required does not include a place where automobiles are kept without extra charge while repairs are being made to them.

Collector of Revenue v. Verret, 38 D.L.R. 630, 28 Can. Cr. Cas. 314, 53 Que. S.C. 21.

AWARD.

See Arbitration; Expropriation; Damages.

BAGGAGE.

See Carriers.

BAIL AND RECOGNIZANCE.

Annotation.

Bail pending decision on writ of habeas corpus: 44 D.L.R. 144.

(§ I—11)—ESTREAT—SUFFICIENCY OF AFFIDAVIT—ACKNOWLEDGMENT—NOTICE TO SURETIES—ORDER OF JUDGE.

The King v. Zarkas, Antonio and Kortes, 39 D.L.R. 776, 11 S.L.R. 51, 29 Can. Cr. Cas. 183, [1918] 1 W.W.R. 323.

(§ I—16)—HABEAS CORPUS—BAIL ON CONCURRENT CHARGES.

Rex v. Drake (N.S.), 29 Can. Cr. Cas. 174.

BAILIFFS.

See Sheriff; Levy and Seizure.

BAILMENT.

See Pledge.

Annotation.

Recovery by bailee against wrongdoer for loss of thing bailed: 1 D.L.R. 110.

(§ III—17)—KENNEL CLUB—LIABILITY OF OFFICERS.

Officers of a kennel club who hold an exhibition are bailees of the dogs placed in their charge, and must use reasonable care and diligence in looking after them. [See Coltart v. Winnipeg Industrial Exhibition, 4 D.L.R. 108.]

Andrew v. Griffin, 39 D.L.R. 202, 12 A.L.R. 516, [1918] 1 W.W.R. 532, affirming [1918] 1 W.W.R. 274.

DESTRUCTION OF GOODS BY STRIKERS—FORCE MAJEURE—PLEADING.

Where coats were entrusted to a workman to make buttonholes in them, and strikers entered his shop and, without his, knowledge, poured corrosive acids on them the damage so caused is due to force majeure. The workman has only to allege and prove such cause, and if the owner of the coats could set up against him a fault which preceded or accompanied it, it was his duty to so allege and prove it. The workman cannot be found to be in fault for not having foreseen that the strikers, after having once entered his shop and made threats to him, would return and damage the coats left with him.

Kaswan v. Solin, 24 Rev. de Jur. 226.

LAWYER—SAMPLES—GRATUITOUS SERVICE.

A lawyer, gratuitously agreeing to receive from a client samples of minerals to turn them over to a mining engineer, does not constitute himself their depositary. Once his task is over, he is not bound to see to their conservation nor to their being returned to the client.

West Canadian Coal Mining Syndicate v. Lovett, 53 Que. S.C. 472.

BALLOTS.

See Elections.

BANKRUPTCY.

See Assignment for Creditors.

Winding-up companies, see Companies; Banks.

BANKS.

I. RIGHT TO DO BUSINESS; POWERS.
II. STOCKHOLDERS.
III. OFFICERS AND AGENTS.
A. Qualification; election.
B. Authority; ratification.
C. Liability.
IV. BANKING.
A. Deposits.
B. Collections.
C. Other transactions; discounts, etc.
D. Clearing-house business.
V. INSOLVENCY.
VI. SAVINGS BANKS.
VII. CRIMES.
VIII. STATUTORY SECURITY TO BANKS.
A. What banks may lend on.
B. What banks may not lend on.
C. Warehouse receipts, bills of lading or statutory securities.
D. Penalties.

See also Bills and Notes; Cheques.

Rate of Interest, see Interest.

Procedure under Winding-up Act, see Companies, VI.

Annotations.

Banking; deposits; particular purpose; failure of; application of deposit: 9 D.L.R. 346.

Effect of war on enemy banks: 23 D.L.R. 375, 379.

How affected by moratorium: 22 D.L.R. 865.

Rate of interest that may be charged by bank: 42 D.L.R. 134.

I. Right to do business; powers.

See Constitutional Law.

II. Stockholders.

See Companies.

III. Officers and agents.

See Companies.

C. LIABILITY.

(§ III C—35)—GUARANTEE BY MANAGER—AUTHORITY—BANK RECEIVING BENEFIT.

The officers of a bank are held out to the public as having authority to act according to the general usage of their business, and their acts, within the scope of such usage and of their several lines of duty, will, in general, bind the bank in favour of third persons who possess no other knowledge. A bank is liable on a guarantee given by its local manager for the repayment of a loan made to a customer of the bank, the loan to be used by the customer in assisting it in its business and reducing its indebtedness to the bank, and being paid to the manager and by him deposited to the credit of the customer, the fact that the manager had no authority to give such guarantee being unknown to the lender, and the bank receiving a benefit from the transaction.

Stevens v. Merchants Bank of Canada, (Man.) 42 D.L.R. 171, [1918] 2 W.W.R. 554.

IV. Banking.

A. DEPOSITS.

(§ IV A—45)—ACCOUNTS IN JOINT NAMES.

A written direction to the manager of a bank, to open a joint account in the names of the depositors, stating that all moneys which may be deposited are their joint property, is in no sense a contract between the parties themselves, and is not proof that the plaintiff is in fact entitled to one-half of the account, although evidence against either of them as an admission in favour of the other.

Southby v. Southby, 38 D.L.R. 700, 40 O.L.R. 429.

POWER OF ATTORNEY—TO DRAW—REVOCATION—KNOWLEDGE.

A power of attorney by which a creditor authorizes an advocate "to withdraw for me the sum of $2,025, and to give a receipt for it in my name, to endorse all documents and cheques, and ratifying in advance everything that he shall do for withdrawing the said sum," gives the attorney the right not only to receive this amount from the debtor, but also to deposit it in a bank and to withdraw it upon his or their own cheques. A creditor has no recourse against a bank which has paid such sum to the attorney, if the bank had no knowledge of the revocation of the power of attorney, or of any fraud committed by him. The knowledge which a bank has that a deposit is made by an agent

for his principal does not prevent the agent from drawing money upon his cheques. The responsibility of the bank is only concerned in a case in which it has profited by the funds.

Robidoux v. Royal Bank, 44 D.L.R. 765, 54 Que. S.C. 529.

(§ IV A—50)—Set-off against general account of depositor—Assignee.

Roy v. Canadian Bank of Commerce, 38 D.L.R. 742, 24 B.C.R. 397.

(§ IV A—60)—Cheque — Authority to sign.

A cheque signed by delegated authority is notice to the bank that the person signing only has a limited authority to sign and the bank is bound to enquire as to the extent of such authority.

Swift Canadian Co. v. Ouimet, 40 D.L.R. 597, 24 Rev. Leg. 260.

Payment of cheques—Account—Credits.

A bank is not bound to pay a cheque drawn upon an account in credit, if upon considering all the accounts of the drawer in the bank he is not in credit.

Clarkson v. Dominion Bank, 38 D.L.R. 232, 40 O.L.R. 245, affirming 37 O.L.R. 591.

Lien—Duty to cash cheque or return it.

Held, that where a cheque is delivered to a banker to be cashed, he must either cash it or return it. He cannot place the money to the payee's credit and assert a lien thereon for the amount of a judgment previously recovered by the bank against the payee.

Rouxel v. Royal Bank, 11 S.L.R. 218, [1918] 2 W.W.R. 791.

(§ IV A—66)—Liability for dishonouring cheque.

No action lies by the holder of a cheque against a bank refusing to honour it whilst there were funds to meet it.

Dubreuil v. Bank of Montreal, 19 Que. P.R. 168.

C. Other transactions; discounts, etc.

(§ IV C—111)—Guaranty—Illegal rate of interest.

A director of an incorporated company who has given a written guarantee to a bank that he would pay any indebtedness incurred by the company to the bank, not exceeding $3,000, is not released by the bank charging the company interest at a rate higher than that allowed by the Bank Act, without the knowledge of the company. The agreement between the bank and the company is not void because of the illegal interest charged, but the bank can only recover interest at the legal rate and the guarantor is liable for the amount which can be legally claimed not exceeding $3,000.

Merchants Bank of Canada v. Bush, 42 D.L.R. 236, 56 Can. S.C.R. 512, [1918] 2 W.W.R. 574, reversing 38 D.L.R. 499, 24 B.C.R. 521.

Loan—Interest—Agreement.

Art. 1789, C.C. (Que.), which declares that "the rate of conventional interest may be fixed by agreement between the parties, with the exceptions, 1, 2, 3, of banks, etc.," only applies to banks legally constituted as bodies politic, and not to individuals styled bankers and doing financial business.

Rousseau v. Robillard, 53 Que. S.C. 523.

Payment—Debt of company to bank—Promissory note held by bank as collateral security—Deposits made in bank by two of the makers of sums equalling whole indebtedness—Question whether deposits equivalent to payment—Evidence—Finding of trial Judge—Appeal.

Royal Bank v. Johnston, 14 O.W.N. 292.

V. Insolvency.

See Companies.

VI. Savings banks.

(See previous Annual Digests.)

VII. Crimes.

(See previous Annual Digests.)

VIII. Statutory security to banks.

A. What banks may lend on.

(§ VIII A—160)—Priorities—Wages.

The provision of the Bank Act (Can. stats. 1913, s. 88 (7)) giving priority for wages, salaries or other remuneration over any security given to the bank does not apply to contractors, but only to wage earners.

Battle Island Paper Co. v. Molsons Bank, 38 D.L.R. 372, 27 Que. K.B. 28.

Advances—Agreement.

Securities given to a bank after a promise or agreement to give them, and after advances have been made on the strength of such promise or agreement, are valid under clause 4 (b) of s. 90 of the Bank Act. (Can. stats. 3 and 4 Geo. V., c. 9).

Clarkson v. Dominion Bank, 38 D.L.R. 232, 40 O.L.R. 245, affirming 37 O.L.R. 591.

Mortgage—Scope of security—Subsequent liability—Creditor.

A mortgage to a bank cannot be a valid security for a liability contracted subsequently to its execution. A bank which is secured as to part of a claim may be an unsecured creditor as to the remainder thereof.

Re Edmonton Brewing & Malting Co. (No. 2) (Alta.), 43 D.L.R. 748, [1918] 3 W.W.R. 988.

Renewal note—Bank Act—Pledge of manufactured goods — Estoppel — Removal of goods—Consent — Evidence.

In order that a note may be a renewal note within the meaning of sec. 90 of the Bank Act, ch. 9, 1913 (Dom.), it is not necessary that it be for the same amount between the same parties for the same period as and commencing from the date of maturity of the original note; thus a renewal note may be one for the amount remaining unpaid after a part

payment on the original note or it may be a note consolidating two or more original notes [Barber v. Mackrell, 40 W.R. 618, and Credit Co. v. Pott, 6 Q.B.D. 295, distinguished]. A manufacturing company which had borrowed money from the plaintiff bank on the security of goods alleged to have been manufactured by it, held to be estopped from objecting, on the ground that the goods could not be legally pledged, to their seizure and removal by the bank. The defendant company which had pledged its goods to the plaintiff bank for advances held upon the evidence to have consented to the removal of the goods by the bank.

Merchants Bank of Canada v. Winnipeg Fur Co. (Man.), [1918] 1 W.W.R. 351.

B. WHAT BANKS MAY NOT LEND ON.

(§ VIII B—175)—EXECUTION—ASSIGNMENT OF LEASE—CROPS—BILL OF SALE.

A bank, which had notice of executions against a debtor who was also indebted to the bank at the time, advanced money to put in and harvest a crop grown partly on the debtor's homestead which he had leased to his infant son on a crop payment lease, and partly on the other land also leased by the son on a similar lease; both leases were assigned by the son to the bank and both father and son undertook that the proceeds of the sale of the crops would be applied first in payment of the advances and next to the payment of the old debt of the father's to the bank; bills of sale of the severed crop were subsequently given to the bank under a covenant for further assurance in the assignments. Fitzpatrick, C.J., held, that the transactions were not fraudulent as against the father's creditors but as the bank had notice of the executions at the time of entering into the transactions, it lost its security on the father's share of the crop grown on the homestead, but the rest of the grain in which the father had no interest remained as security to the bank. Idington and Anglin, JJ., held, that so far as the bills of sale of the crops were intended to secure the past debt to the bank they were fraudulent and void, and the assignments were void, under sec. 15 of the Bills of Sale Ordinance (Con. Ord. N.W.T., ch. 43), Idington also held that the transactions were void under the Bank Act (sec. 76, sub-sec. 2 (e). Davies and Duff, JJ., dissented without giving written reasons.

McKillop v. Royal Bank of Canada, 40 D.L.R. 556, 56 Can. S.C.R. 220, [1918] 2 W.W.R. 100, reversing in part 33 D.L.R. 268, 10 A.L.R. 304.

BARRISTERS.

See Solicitors.

BASTARDY.

(§ I—5)—MAINTENANCE—FORM OF AFFIDAVIT OF AFFILIATION—CONSTRUCTION OF ILLEGITIMATE CHILDREN'S ACT — "REALLY."

Broderick v. McKay, 39 D.L.R. 795, 40 O.L.R. 363.

ORDER FOR SUPPORT—POWER OF JUDGE — EXPENSES OF BIRTH—AMOUNT.

An order made under an Act respecting the support of illegitimate children, ch. 39, 1912, by the Judge of the District Court wherein the complainant resides is not bad because of the omission of words therein indicating the capacity in which the Judge acted, but the order may be amended. A provision in such an order requiring the respondent to pay the expenses incidental to the birth of the child but which does not fix the amount thereof is bad, and where there is no evidence as to such amount the provision should be struck out, but the fact that such provision cannot stand does not make the whole order bad.

Re Holmes (Sask.), [1918] 2 W.W.R. 883.

BAWDY HOUSE.

See Disorderly Houses.

BENEVOLENT SOCIETIES.

See also Associations; Charities; Religious Institutions.

Lodge benefit certificate, see Insurance.

EXPULSION OF MEMBERS.

No member of an association can be expelled without a resolution validly adopted; and verbal decision taken at a meeting cannot supplement the absence of such a resolution and have any effect. In the absence of powers conferred to the parties by the deed of association, no member can be expulsed; and in case of any violation of the by-laws, and of the existence of serious grounds of complaint, recourse must be had to the tribunal.

Wohlk v. Montreal Protective Shoemakers Ass'n, 54 Que. S.C. 29.

CONSPIRACY — ASSAULT — EXPULSION FROM RELIGIOUS SOCIETY — ACTIONABLE WRONGS—LIABILITY OF SEVERAL DEFENDANTS—ROMAN CATHOLIC EPISCOPAL CORPORATION — CORPORATION SOLE —INCORPORATING ACT, 7 & 8 VICT. (CAN.), CH. 82, SEC. 6—LIABILITY OF BENEVOLENT SOCIETY INCORPORATED UNDER ONTARIO ACT—PERSONAL LIABILITY OF ARCHBISHOP — PARTICIPATION IN WRONGFUL ACTS—LIABILITY OF PHYSICIAN—FINDINGS OF JURY—ADMISSION OF EVIDENCE OF ACTS COMMITTED AFTER ASSAULT—EXAMINATION FOR DISCOVERY —RULE 330—DAMAGES—SPECIAL JURY —SEPARATE ASSESSMENTS AGAINST DEFENDANTS—APPEAL—COSTS.

Basil v. Spratt, 15 O.W.N. 171, varying 13 O.W.N. 249.

BETTING.

See Gaming; Lottery.

Annotation.

Betting house offences: 27 D.L.R. 611.

BIGAMY.

(§ I—15)—PROOF THAT OFFICIATING MINISTER QUALIFIED.

On a charge of bigamy the celebration of

the first marriage by a minister of some religious denomination "recognized as duly ordained" (R.S.N.S. ch. 111), is sufficiently shewn by proof that the person officiating was a clergyman de facto in charge of the church where the ceremony took place and made return thereof as "locum tenens."

Rex v. Adeline Cameron (N.S.), 29 Can. Cr. Cas. 113.

PROOF OF FIRST MARRIAGE—FOREIGN LAW—MARRIAGE CERTIFICATE—CORRESPONDENCE—ADMISSIBILITY—KNOWLEDGE OF ACCUSED OF FORMER MARRIAGE AND THAT WIFE STILL LIVING—PROOF OF.

Rex v. Debard, 15 O.W.N. 250.

BILLS AND NOTES.

I. NATURE; REQUISITES AND VALIDITY.
- A. In general.
- B. Validity generally; delivery.
- C. Consideration.
- D. Negotiability.

II. ACCEPTANCE.

III. INDORSEMENT AND TRANSFERS.
- A. In general.
- B. Liability of indorsers.
- C. Discharge of indorsers.
- D. Transfers without indorsement.

IV. PRESENTMENT; DEMAND; NOTICE; PROTEST.
- A. In general; necessity.
- B. Sufficiency.
- C. Notice of protest; certificate.
- D. Damages for non-acceptance, non-payment and protest.

V. RIGHTS AND LIABILITIES OF TRANSFEREES.
- A. Extent of rights and protection generally.
- B. Who are protected as bonâ fide purchasers.

VI. ACTIONS AND DEFENCES; ACCELERATION; MATURITY; EXTENSION AND RENEWAL.
- A. In general; right to sue.
- B. Maturity; extension; renewal.
- C. Defences.

VII. RECOVERY BACK OF PAYMENT MADE.

Annotations.

Filling in blanks: 11 D.L.R. 27.

Presentment at place of payment: 15 D.L.R. 41.

Renewal; promissory note; effect of renewal on original note: 2 D.L.R. 816.

How affected by moratorium: 22 D.L.R. 865.

Effect of war on alien bills and notes: 23 D.L.R. 375, 377.

Delay in presenting cheque for payment: 40 D.L.R. 244.

I. Nature: requisites and validity.

A. IN GENERAL.

Lien note, see Sale.

(§ I A—1)—MEMORANDUM WRITTEN AT BOTTOM.

An instrument which on its face complies with all the requirements of a valid promissory note is not invalidated as such by a memorandum written at the foot of the document, which constitutes an independent agreement relating to something to be performed immediately upon payment of the note.

O'Grady v. Lecomte (Man.), 40 D.L.R. 378, [1918] 2 W.W.R. 267, reversing [1918] 1 W.W.R. 115 affirmed, 44 D.L.R. 756, 57 Can. S.C.R. 563.

(§ I A—4 a)—BLANK FORM — ALTERATION — HOLDER IN DUE COURSE.

Striking out the place of payment printed in a form which is intended to be used as a promissory note and which has been signed, and delivered, and inserting another place of payment, is a material alteration, and is excluded by sec. 31 of the Bills of Exchange Act (R.S.C. 1906, ch. 119); the alterations being apparent, an indorsee does not become a holder in due course, but is put upon inquiry, and can stand in no better position than the party endorsing the notes to him.

Bellamy v. Williams, 40 D.L.R. 396, 41 O.L.R. 244; 13 O.W.N. 259, affirming 12 O.W.N. 232.

B. VALIDITY GENERALLY; DELIVERY.

(§ I B—5)—SALE PROHIBITED—CONTAGIOUS DISEASES ACT.

The Contagious Diseases Act, R.S.C. 1906, ch. 75, sec. 38, is in force in Manitoba notwithstanding R.S.M. 1913, ch. 8. The Act prohibits and makes illegal the sale of any animal afflicted with an infectious disease, and a promissory note given for the purchase price of such animal is void; knowledge on the part of the vendor is immaterial. [Nickle v. Harris, 3 S.L.R. 200, followed; Manitoba El. & Gas Co. v. Gerrie, 4 Man. L.R. 210; Bartlett v. Vinor, Carthew 252, 90 E.R. 750; Forster v. Taylor, 5 B. & Ad. 887, 110 E.R. 1019; Benslev v. Bignold, 5 B. & Ald. 335, 106 E.R. 1214, referred to.]

Baldwin v. Snook (Man.), 40 D.L.R. 333, [1918] 2 W.W.R. 314.

JOINT AND SEVERAL LIABILITY—INFANT—CLUB.

When several persons sign a note "We promise to pay," they are jointly and severally liable, if the note is given for a commercial debt. It is otherwise if it is a civil debt. A minor, who is a member and officer of an unincorporated athletic association and who signs a note personally for the benefit of the association, without receiving any benefit himself, is not responsible for the amount of the note. A club formed for amusement, which sells cigars and refreshments to its members, in small quantities, does not do an act of trade.

Cassaubon v. Bédard, 54 Que. S.C. 385.

C. CONSIDERATION.

(§ I C—28)—CONSIDERATION ILLEGAL.

Promissory notes which are in reality given to the holder of a public office as payment for his influence in obtaining a contract for the erection of a public building, although appa-

rently given in payment for shares in a company, are illegal and void as contrary to public order.

Cloutier v. Trudel, 41 D.L.R. 145, 24 Rev. de Jur. 317, 54 Que. S.C. 459.

ILLEGAL CONSIDERATION — CRIMINAL PROCEEDINGS.

Held, the note signed by defendant as part payment of plaintiff's claim against one of defendant's relatives, so as to prevent further criminal proceeding, must be considered as having been given for an unlawful consideration, against public policy, null and void, and defendant cannot be held liable thereon. Plaintiff's action must therefore be dismissed.

S. B. Townsend Ltd. v. Holder, 24 Rev. de Jur. 225.

D. NEGOTIABILITY.

(§ I D—40)—CERTAINTY AS TO MATURITY.

A promise in writing payable on the happening of any one of a number of events or at any time at the option of the promisee is not a promissory note within the meaning of sec. 176 of the Bills of Exchange Act (R.S.C. 1906, ch. 119), "To pay on demand or at a fixed or determinable future time." [Robert Bell v. Topolo (Sask.), 32 D.L.R. 77, referred to.]

Gardiner v. Muir, 38 D.L.R. 115, 10 S.L.R. 388.

CHEQUE—DATE OF PAYMENT.

The date of payment made by a cheque is not that which the cheque bears, but that of the receipt and acceptance of such bill by the creditor.

Cleveland Stove Co. v. Walters, 54 Que. S.C. 154.

II. Acceptance.

(§ II—50)—BILLS OF EXCHANGE—ACCEPTANCES—RENEWAL OF EARLIER INSTRUMENTS—AGREEMENT—SALE OF PATENT RIGHT—BILLS OF EXCHANGE ACT, SECS. 14, 131, 145—BILLS NOT ADDRESSED TO ONE OF THE ACCEPTORS—CHANGE IN ADDRESS—DISCOUNT OF BILLS BY DRAWERS—ADOPTION OF CHANGE—BANK—HOLDER IN DUE COURSE—EVIDENCE—RATIFICATION — ESTOPPEL — ALTERED BILL—TITLE OF BANK—SUSPICION—INQUIRY.

Sterling Bank of Canada v. Thorne, 15 O.W.N. 39.

CHEQUES—EFFECT OF ACCEPTANCE BY SELLER FROM BUYER OF CHEQUE OF THIRD PERSON IN EXCHANGE FOR GOODS—BARTER OF CHEQUE WITH ALL RISKS—DISHONOUR OF CHEQUE — ACTION AGAINST BUYER FOR PRICE OF GOODS.

McGlynn v. Hastie, 15 O.W.N. 178.

III. Indorsement and transfers.

A. IN GENERAL.

(§ III A—55)—FRAUD—WARRANTY.

When the transferor of a note or a claim fraudulently conceals the debtor's insolvency, he is a warrantor of the claim transferred by operation of law, in the absence of any express guaranty.

Vezina v. Meilleur, 24 Rev. Leg. 300.

B. LIABILITY OF INDORSERS.

(§ III B—60)—ENDORSEE REAL MAKER—EVIDENCE—ADMISSIBILITY.

In an action upon a promissory note evidence of the transaction in respect to which the note was given is admissible in support of the contention that a person whose name appears on the note as an endorsee was the real maker and had endorsed the note for the accommodation of the nominal maker.

Brunelle v. Benard (Man.), [1918] 3 W.W.R. 809.

(§ III B—63)—ACCOMMODATION—SURETY.

An accommodation party on a promissory note is a surety towards the person accommodated, but not with regard to his co-indorsers; and their juridical relations must be determined according to the principles of suretyship. An indorser by accommodation, who pays the note, can recover, from the maker and the other indorser, only the amount which he paid to the bearer of the note. As a surety he may acquire the claim for which he bound himself, instead of purely paying it, and in such a case he acquires all the rights of the creditor against the debtor.

Jacobs v. Starfilms, Ltd., 53 Que. S.C. 363.

C. DISCHARGE OF INDORSERS.

(§ III C—77)—DISHONOUR—NOTICE—DUE DILIGENCE.

The Bills of Exchange Act (R.S.C., ch. 119) provides the method and time in which notice of dishonour of a promissory note is to be given; a holder cannot elect to give personal notice if delay is caused thereby.

Dowler v. Edwards, 40 D.L.R. 180, 13 A.L.R. 259, [1918] 2 W.W.R. 345.

IV. Presentment; demand; notice; protest.

B. SUFFICIENCY.

(§ IV B—90)—CHEQUE—NOTICE OF DISHONOUR—DELAY IN PRESENTATION.

Held, the notice of dishonour of the cheque endorsed by defendant at Ormstown must, under the special circumstances of this case, be considered valid and legal although the same was addressed to defendant at Ste. Martine, whereas said defendant, at the time and long before, resided at Ste. Clothilde. 2. The loss resulting from the tardy presentation of a cheque, when there were sufficient funds to pay the same at the time of the making thereof, must be borne by the party who is at fault. Under the evidence of record in the present instance, such loss must be borne by defendant and in consequence plaintiff's action must be maintained and the action in warranty dismissed with costs.

Sorel v. Hebert, 24 Rev. de Jur. 473.

NOTICE OF DISHONOUR—BY MAIL—MISCARRIAGE.

Where a notice of dishonour of a promissory note is duly addressed and posted at the place where the note is dated, as provided by R.S.C. 1906, ch. 119 secs. 103 and 104, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post office.

Banque D'Hochelaga v. Hanson, 53 Que. S.C. 266.

C. NOTICE OF PROTEST; CERTIFICATE.

(§ IV C—100)—WAIVER OF PROTEST—ORAL PROOF.

An agreement to waive protest of a bill payable to order can be proved by witnesses, even if the consideration for the bill is not connected with commercial matters.

Kalnitsky v. Hartz, 53 Que. S.C. 391.

D. DAMAGES FOR NON-ACCEPTANCE, NON-PAYMENT AND PROTEST.

(§ IV D—104)—CHEQUE—UNREASONABLE DELAY—DISCHARGE OF MAKER.

The maker of a cheque is discharged from his liability if the agent of the payee, instead of insisting on prompt payment out of funds then available, allows an unreasonable time to elapse, and then accepts a draft, which is dishonoured, on another bank, immediately after which the drawee goes into insolvency.

Rogers v. Calgary Brewing & Malting Co., 40 D.L.R. 238 (annotated), 56 Can. S.C.R. 165, [1918] 1 W.W.R. 965, reversing 34 D.L.R. 252, 33 D.L.R. 173.

V. Rights and liabilities of transferees.

A. EXTENT OF RIGHTS AND PROTECTION GENERALLY.

(§ V A—105)—ACCOMMODATION MAKER—EXONERATION.

An accommodation maker of a note is entitled to exoneration by the principal debtor from liability on the note, even before payment of the note is demanded, and may obtain a declaration to that effect in an action against the principal debtor.

Ramer v. Marcus, 39 D.L.R. 725, 52 N.S.R. 8.

JOINT AND SEVERAL LIABILITY—COLLECTION.

A promissory note payable to order may be signed by several persons and in that case they are held jointly and severally liable. If the note commences with the words "I promise" the makers are jointly and severally bound. The holder of a note for collection has the right to sue on it.

Audette v. Heald, 24 Rev. Leg. 230.

JOINT OWNERSHIP.

One who is half owner of a note cannot dispossess the owner of the other half who holds the note.

Beaucage v. Brunette and Sorel, 54 Que. S.C. 383.

EFFECT OF INSOLVENCY.

A transferee, under whose name the insolvent is disguised, has no action for the payment of a note made in favour of the insolvent estate. One who sets up that he is not a holder according to law, does not take advantage of another's right, but of his own right to pay only to the creditor or to some one authorized to receive payment, as to a holder vested with the right of action.

Drouin v. Bertrand, 24 Rev. de Jur. 29.

(§ V A—111)—RIGHTS AFTER MATURITY—EQUITIES—RENEWAL.

A note payable to order, endorsed and deposited in a bank by the payee, for collection, is held by the bank in trust for her; if the husband obtains possession of the note after maturity and dishonour, he takes subject to the trust, and any renewal obtained by him does not change the title.

Roblin v. Vanalstine, 38 D.L.R. 159, 40 O.L.R. 99.

(§ V A—116)—ACCOMMODATION MAKER—SURETY—LIABILITY TO ENDORSEE WHO ADVANCED MONEY UPON SECURITY OF NOTE—NOTE MADE PAYABLE TO BANK—TITLE TO NOTE—HOLDER IN DUE COURSE—BILLS OF EXCHANGE ACT, SEC. 70—ESTOPPEL.

Fox v. Patrick, 14 O.W.N. 263, affirming 13 O.W.N. 400.

(§ V A—118)—KNOWLEDGE OF EQUITIES—SALE.

The holder of a bill in due course for value is not affected by his knowledge at the time he acquired the bill that it was given for a chattel so defective as to justify the rejection thereof by the purchaser.

Union Bank of Canada v. Benson, 39 D.L.R. 661, 11 S.L.R. 88, [1918] 1 W.W.R. 915.

B. WHO ARE PROTECTED AS BONÂ FIDE PURCHASERS.

(§ V B—130)—ALTERATION—BLANK—TIME OF PAYMENT.

When a note is transferred to a third person for the purpose of bringing suit and recovering judgment such person may sue in his own name. It is not an essential alteration of a note in which a blank was left after the word "one," the date of payment not being stated, if the holder fills in such blank by adding the word "month," provided that the time of maturity of the note is not shortened.

Giguère v. Pagnuelo, 53 Que. S.C. 63.

(§ V B—138)—HOLDER IN DUE COURSE—NOTICE—CONSIDERATION.

Duplessis v. Edmonton Portland Cement Co., 39 D.L.R. 756, 55 Can. S.C.R. 623, affirming 11 A.L.R. 58, affirming 28 D.L.R. 748.

VI. Actions and defences; acceleration; maturity; extension and renewal.

A. IN GENERAL; RIGHT TO SUE.

(§ VI A—150)—ACCEPTANCE—DISHONOUR—DRAWER'S RIGHTS.

A drawer of a bill of exchange made payable to the order of a third party, and duly accepted, can, upon the dishonour and return

of the bill, maintain an action against the acceptor in his own name, without first obtaining the indorsement of the payee.

Cossey v. McManus (N.S.), 40 D.L.R. 369.

REMEDY OF HOLDER—INSOLVENCY.

As a creditor has a right to exercise, at the same time, the different remedies which the law gives him, a holder of a note may put in a claim on the insolvency of one of the makers and, at the same time, sue both of the makers, jointly and severally.

Charest v. Gervais, 24 Rev. Leg. 245.

RIGHTS OF INDORSER—WARRANTY—SERVICE—COSTS.

The indorser of a note may, by dilatory exception, stay the plaintiff's action to call in warranty the signer of the note on which the action is based. If security judicatum solvi has been ordered, the delay for producing such dilatory exception runs from the day of presentation of the security. A plaintiff who untimely contests a dilatory exception of warranty will be ordered to pay the costs of such exception.

Compania Ingeniera, etc., v. San Martin Mining Co., 20 Que. P.R. 274.

WARRANTY—PARTIES.

The maker of a promissory note, sued by the holder, may, by exception, call in warranty the party in whose favour the note was originally made.

Dawson & Co. v. Jago Co., 19 Que. P.R. 157.

COLLATERAL AGREEMENT—NOTES PAYABLE ONLY UPON EVENT WHICH DID NOT HAPPEN—DELIVERY UP AND CANCELLATION OF NOTES HELD BY PAYEE—NOTES TRANSFERRED TO THIRD PERSON—CLAIM FOR DAMAGES FOR TRANSFERRING NOTES—VALIDITY OF AGREEMENT—COUNTERCLAIM—FRAUD AND MISREPRESENTATION—FAILURE TO PROVE.

Burton v. Cundle, 14 O.W.N. 306.

COLLATERAL AGREEMENT—NOTES PAYABLE ONLY UPON EVENT WHICH DID NOT HAPPEN—TRANSFER BY PAYEE TO PLAINTIFF—NOTICE TO TRANSFEREE OF AGREEMENT—TRANSFEREE SUBJECT TO EQUITIES BETWEEN ORIGINAL PARTIES—ACTION ON NOTE RETAINED BY TRANSFEREE—DISMISSAL—DAMAGES FOR FRAUDULENTLY TRANSFERRING OTHER NOTES TO PERSONS WHO COMPELLED PAYMENT—COUNTERCLAIM.

Huff v. Burton, 14 O.W.N. 307.

ACTION BY EXECUTOR OF PAYEE—DEFENCE AND COUNTERCLAIM—NOTES MADE BY SON OF DECEASED PAYEE—BARGAIN ALLEGED TO HAVE BEEN MADE WITH FATHER—STATUTE OF FRAUDS.

O'Neill v. O'Neill, 15 O.W.N. 9.

B. MATURITY; EXTENSION; RENEWAL.

(§ VI B—158)—ALTERATION—RENEWAL—DEPOSIT IN BANK—RIGHTS OF ENDORSER.

If a note given in renewal of a previous note, but without novation, is altered by adding the words "with interest," the holder may sue on the original note. When a depositor owes a bank on several notes, all of the same class, an amount exceeding his deposit, and the maker of the notes has not declared how his payment was to be applied, and has withdrawn all his funds from the bank, the endorser of one of the notes cannot plead payment by compensation.

La Banque Nationale v. Joncas, 24 Rev. Leg. 365.

PROMISSORY NOTES—AGREEMENT FOR RENEWAL — CANCELLATION — MISREPRESENTATION—EVIDENCE — IMMATERIALITY—ACTION ON NOTES—JUDGMENT.

Piggott v. Hedrick, 15 O.W.N. 123.

BILLS AND NOTES (§ VI B—159)—STAY OF ACTION—WAR RELIEF ACT.

A bank may recover against an endorser of a promissory note, notwithstanding that the action is stayed as against the principal debtor by the War Relief Act. The deposit of certificates of title with the bank as additional security at the time the advance was made, although an unenforceable hypothecation, does not relieve the surety from liability.

Royal Bank v. Gold, (B.C.) 41 D.L.R. 276, [1918] 2 W.W.R. 745,

C. DEFENCES.

(§ VI C—160)—ACTION BY ENDORSEE—DEFENCE OF FRAUD—EVIDENCE—PLEADING.

In an action by the endorsee of a promissory note against the makers thereof wherein the defence was set up that the defendants had been induced to sign the note by fraud and the whole of the evidence bearing upon the point was taken upon commission, held, on two grounds, that the court was not justified in refusing to accept the denial by the plaintiff and his brother, who purchased the note for him, of any knowledge concerning the transaction in which the note originated or any suspicion touching the validity of it, the first of such grounds being that the circumstances relied upon by the defendant were insufficient to support a successful impeachment of the testimony in question, and the second, that there was no notice in the pleadings or otherwise shewing the circumstances upon which the defendants relied as sustaining or pointing to their imputations of bad faith and no opportunity was given the witnesses for the plaintiff to explain or qualify the facts or conduct upon which the defendants mainly based their attack (per Duff, J., Davies and Anglin, JJ., concurring; Fitzpatrick, C.J., and Idington, J., dissenting).

Peters v. Perras, 13 A.L.R. 80.

DENIAL OF SIGNATURE—AFFIDAVIT.

Arts. 1233, C.C. (Que.) and 208, C.C.P., only create in favour of the holder of a promissory note who sues the maker, a pre-

sumption juris tantum, and the defendant should be allowed to prove that the signature on the note is false, although he has not accompanied his plea with the affidavit required by the said articles.
Blais v. Mathieu, 20 Que. P.R. 244.

DURESS — ACTION ON CHEQUE — SIGNING CHEQUE TO OBTAIN RELEASE FROM CUSTODY—ARREST IN FOREIGN COUNTRY—FRAUD—DEFENCE TO ACTION.
Blanchard v. Jacobi, 15 O.W.N. 35, 43 O.L.R. 442.

VII. Recovery back of payment made.
(See previous Annual Digests.)

BILLS OF EXCHANGE.
See Bills and Notes; Cheques; Banks.

BILLS OF LADING.
See Carriers; Shipping.

BILLS OF SALE.
See Chattel Mortgage; Sale.

Annotation.
Registrability of hiring, lease, or conditional sale of chattels: 32 D.L.R. 566.

BOARDS.
School Board, see Schools.
Board of Railway Commissioners, see Railway Board.

BOATS.
See Shipping; Admiralty; Collision.
Seamen's wages, liens for, see Seamen.

BONDS.
I. IN GENERAL; FOR PRIVATE OBLIGATIONS.
II. FOR INDEMNITY AND SECURITY.
  A. In general.
  B. For fidelity of employees or corporate officers.
  C. By public officers.
  D. By public depository.
III. COMMERCIAL AND MUNICIPAL.
  A. Corporate bonds.
  B. Municipal bonds.

I. In general; for private obligations.
See Principal and Surety; Guaranty.

II. For indemnity and security.
(See previous Annual Digests.)

III. Commercial and municipal.

A. CORPORATE BONDS.
See Companies.

B. MUNICIPAL BONDS.

(§ III B—90)—RIGHT TO INTEREST—VENDOR AND PURCHASER.
According to well established custom governing the sale of bonds or debentures, when they are purchased for so much on the dollar, without accrued interest, the purchaser and not the seller gets the benefit of the interest on all coupons current and not due.
Les Commissaires d'Ecoles pour le Municipalité Scolaire d'Hochelaga v. Hingston, 24 Rev. Leg. 160.

RAILWAY—TRUSTEE FOR BONDHOLDERS AND FOR MUNICIPAL CORPORATIONS GUARANTEEING PAYMENT OF BONDS—ACCOUNT—PAYMENTS MADE BY TRUSTEE UNDER ENGINEER'S CERTIFICATES PURSUANT TO DIRECTIONS OF ORDER OF COURT MADE UPON SUMMARY APPLICATION—VALIDITY OF ORDER—RULES 938-943 OF 1897—MOTION BY WAY OF ORIGINATING NOTICE—NO NOTICE OF MOTION SERVED—REPRESENTATION OF INTERESTS OF ALL PARTIES UPON MOTION—SEVERAL MUNICIPAL CORPORATIONS IN SAME INTEREST REPRESENTED BY ONE—RULES 193, 358 OF 1897—CONTRACT—MORTGAGE-DEED—REQUIREMENTS AS TO CERTIFICATES—DUTY OF TRUSTEE—SALE OF UNGUARANTEED BONDS.
Stothers v. Toronto General Trusts Corporation, 15 O.W.N. 253, affirming 13 O.W.N. 290.

BORNAGE (QUE.)
See Boundaries.

BOUNDARIES.
I. OF DOMINION, PROVINCE OR MUNICIPALITY.
II. OF PRIVATE PROPERTY.
  A. In general; rules for fixing.
  B. By highway or passageway.
  C. By waters.

I. Of Dominion, province or municipality.

(§ I—3)—PUBLIC PLACE—SIDEWALK—PRESCRIPTION—POSSESSION—LAND SURVEYORS—MEASUREMENTS.
In an action between a municipal corporation and a riverside proprietor, to establish the boundaries of a public place, the following facts were held not to establish a 30-year prescription from possession: placing doorsteps on the sidewalk; having cornices and verandahs projecting above the sidewalk; having a sewer which ran along the edge of the land in litigation; putting agricultural implements and other goods on the sidewalk; paying municipal taxes. It is not illegal for land surveyors entrusted with the setting of boundaries to let their chainmen go alone to measure the land, provided that they personally ratify their work and declare the correctness of it; to take their measurements in English feet, if they afterwards reduce them into French measurements; not to verify their standards of measures of length by the Minister of Lands or by some one authorized by him, or by the secretary of the board of management of the land surveyors, as the Act prescribes.
Lord v. La Ville de St. Jean, 24 Rev. Leg. 303.

II. Of private property.

A. IN GENERAL; RULES FOR FIXING.

(§ II A—5)—SETTLEMENT OF BOUNDARY—DEFAULT—EXPENSES AND COSTS.
The putting in default, required before taking an action to settle a boundary, may

be inferred from facts previous to the action. If it is established that those facts amount to a refusal from the defendant to agree to settle the boundary, the Court will condemn the latter to the costs incurred by the contestation, and will order that the costs of the action itself, before contestation, be charged to the parties, as also the costs of the boundary (arts. 504-504a, C.C. Que.) with costs of review against the defendant.

Blais v. Delorme, 24 Rev. de Jur. 304.

BOUNDARY ACTION—CONTIGUOUS PROPERTIES—BROOK—POSSESSION.

The fact that between two estates there is a brook owned by one or the other of the parties does not prevent the bringing of a boundary action; even when the defendant, either himself or by others, had occupied his property for more than 30 years.

Ouellette v. Plante, 54 Que. S.C. 150.

CONCLUSIONS—PETITORY JUDGMENT—MISTAKE—APPEAL—REMANDING CASE.

When, in a boundary action, the parties agree to the respective boundaries of their properties, and make no other conclusions except those referring to the boundaries, and the Superior Court adjudicates on the right of ownership of the parties and dismisses the demand; and the plaintiff before the Court of Review, denies having given up her right, and claims to have only consented to the judgment as being "indicative" of the right of property for boundary purposes, and not "attributive" of such a right as in the petitory action, the trial judgment being based on a misunderstanding between the trial Judge and the plaintiff's attorne s, the Court of Review may order that the record be sent back to the Superior Court so that the parties may proceed there according to their conclusions.

Forget v. Laferte, 24 Rev. Leg. 358.

C. BY WATERS.

(§ II C—15)—BEACH—HIGH WATER MARK.

The line of high water, which is the demarcation between the beach and the solid ground, should be understood to be from the mark of the highest waters of the year, namely, those of the month of March in each year, and not from the usual high water mark.

L'Œuvre et Fabrique de St. Bonaventure v. Leblanc, 27 Que. K.B. 286.

BREACH OF PROMISE.

(§ II—5)—PLEA OF INFANCY—EVIDENCE—PROOF OF PROMISE AND BREACH—VERDICT OF JURY—DAMAGES—ALIEN ENEMY—RIGHT TO MAINTAIN ACTION.

Latha v. Halyczuk, 14 O.W.N. 219.

BREACH OF TRUST.

See Trusts.

BRIBERY.

See Corruption.

BRIDGES.

I. IN GENERAL.
II. DEFECTS; INJURIES ON.

Annotation.

Liability of municipal corporations for non-repair of bridges and highways: 34 D.L.R. 589.

I. In general.

See Highways; Railways.

II. Defects; injuries on.

(§ II—11)—MUNICIPALITY—AUTOMOBILE—ACCIDENT—COMMON FAULT.

Municipalities are not bound to take all the precautions necessary for absolute protection from automobiles in public streets, or upon public bridges, nevertheless if an automobile is thrown below a bridge because the hand rail is completely rotten, the municipality is responsible for having contributed, in part, to the accident. When an automobile wheel turns to the left at a right angle, and thereby causes the automobile to be thrown below a bridge, and the turning of the wheel cannot be explained, the machine must be deemed to have been in bad order, and the owner should be held responsible for a contributory part of the damage which he suffered.

La ville de Belœil v. Rioux, 27 Que. K.B. 329.

BRITISH NORTH AMERICA ACT.

See Constitutional Law.

BROKERS.

I. STOCK BROKERS.
II. REAL ESTATE BROKERS.
A. In general; authority and liability of.
B. Compensation; commissions.
III. BUSINESS AND GENERAL BROKERS.

Agency in general, see Principal and Agent.

Insurance agents, see Insurance.

As affecting agreement for sale of lands, see Vendor and Purchaser.

Annotations.

Real estate brokers; agent's authority: 15 D.L.R. 595.

Real estate agent's commission; sufficiency of services: 4 D.L.R. 531.

I. Stock brokers.

(§ I—1)—INSTRUCTIONS TO SELL AT CERTAIN PRICE—SALE AT LOWER PRICE—LIABILITY.

Gearhart v. Quaker Oats Co. (Sask.) 42 D.L.R. 791.

SALE OF GRAIN—MARGINS—CHEQUE TO COVER—RETURN OF MONEY DEPOSITED

Pootmans v. Regina Grain Co., (Sask.), 42 D.L.R. 787, [1918] 2 W.W.R. 1093.

(§ I—2)—MARGIN—RULES OF STOCK EXCHANGE.

An order to purchase shares "subject to

the rules and regulations of the Montreal Stock Exchange" imports into the contract the custom or usage of brokers on that Exchange, and if it is a usage thereof to buy shares on another Exchange if necessary to fill an order, such a purchase is valid; a broker of such other Exchange buying to fill such an order is an agent of the original broker, not a principal.

McDougall v. Riordan, 38 D.L.R. 198, 24 B.C.R. 446.

GRAIN EXCHANGE—MARGIN—CR. CODE.

Dealing in "futures" on the grain exchange where the intent of the transactions is to meet the obligations to deliver by a set-off of a contract to purchase a like quantity of grain, and to adjust the differences between the selling and the buying prices and by thus dealing in such differences to make gain or profit by an anticipated fall in the price of the merchandise, are in contravention of sec. 231 of the Criminal Code. [Beamish v. Richardson, 23 Can. Cr. Cas. 394, 16 D.L.R. 855, 49 Can. S.C.R. 595, applied.]

Richardson v Gilbertson, 39 D.L.R. 56, 39 O.L.R. 423, 28 Can. Cr. Cas. 431.

TRANSACTIONS BETWEEN — "BORROWING SHARES"—PAYMENT MADE BY BORROWER —"MARKING UP" OR "CLOSING OUT"— CONTRADICTORY EVIDENCE—APPRECIATION OF—CROSS-EXAMINATION—SUSPICIOUS CIRCUMSTANCES—REVERSAL BY APPELLATE COURT OF FINDING OF FACT OF TRIAL JUDGE.

Jarvis v. Connell, 15 O.W.N. 203.

II. Real estate brokers.

A. IN GENERAL, AUTHORITY AND LIABILITY OF.

(§ II A—6)—PROCEEDS APPLIED ON CUSTOMER'S ACCOUNT—STATUTE OF LIMITATIONS.

The business transactions between stockbrokers and one of their customers having been begun, and always carried on, under an agreement in writing whereby when stocks held by the brokers for the customer were sold the proceeds were to be applied on the customer's account and the customer was to pay interest at "such rate or rates" as the brokers "might notify" the customer of from "time to time," a sale of the customer's stocks and the application of the proceeds towards payment of his account, as provided in the agreement, is a payment made by the customer, which saves the broker's claim out of the Statute of Limitations under which it otherwise would be barred. [Waters v. Tompkins, 2 C.M. & R. 723, followed.]

Stark v. Somerville, 41 D.L.R. 496, 41 O.L.R. 591, affirming 40 O.L.R. 374.

B. COMPENSATION; COMMISSIONS.

(§ II B—8)—SALE OF LAND—AGENT—SUB-AGENT—COMMISSION—PRIVITY OF CONTRACT.

Gladue v. Walch (Man.), 43 D.L.R. 757, [1918] 3 W.W.R. 975.

(§ II B—10)—SALE OF REAL ESTATE—PARTIAL PAYMENT OF PRICE—RECEIPT BY AGENT—VARIATION OF TERMS.

Chalmers v. Machray, 39 D.L.R. 396, 55 Can. S.C.R. 612, affirming 26 D.L.R. 529, 26 Man. L.R. 105.

(§ II B—12)—SUFFICIENCY OF SERVICE—CONDITIONAL SALE.

A broker is only entitled to commission if he carries out the terms of his employment in their entirety. An action for commission for the sale of a chattel is therefore premature if the sale is subject to a condition which has not been complied with at the time the action is brought.

Greer v. Godson, 40 D.L.R. 218, 25 B.C.R. 229.

LOAN—POWERS OF CORPORATE OFFICER—CONDITION OF PROPERTY.

The principle that a real estate agent has a right to his commission when he had found a purchaser, and that it was the vendor's fault that the sale was not made, applies equally to a loan. So, an agent can claim his commission if the loan was not made because the lender discovered that the property offered in guarantee was likely to become enclosed, and that the borrower could not succeed in getting rid of such impediment. The borrower, in such case, is liable for the commissions, even if the mandate contained the words "no commission to be paid until the amount of the loan is received." The secretary-treasurer of a company authorized by it to borrow has power to stipulate that the real estate agent employed to find the money shall have the right to a commission. A purchaser or a lender has a right to count upon the apparent condition of the property offered for sale or guarantee; and if the actual condition of the property is different he may refuse to carry out the contract.

Regent Construction Co. v. Johnson, 24 Rev. Leg. 328.

SALE BY OWNER—REVOCATION OF AUTHORITY—DAMAGES—PAROL EVIDENCE.

One who gives a real estate agent a mandate to sell his property without limiting the time, but for a fixed price and for a commission, reserving the right to sell it himself, who in fact does sell the property, thereby tacitly revokes the mandate which he had given to his agent. In such case the agent cannot claim the commissions, but he has a right to damages he has sustained if the revocation was not warranted. In order to get damages, the agent must prove that he had actually found a purchaser. A mandate to a real estate agent for the sale of a property cannot be proved by witnesses without commencement of proof in writing. Such commencement of proof exists, when the principal so sued pleads admitting the mandate but maintaining that it had been agreed that if sale was not made by the agent he had no right to commissions.

Caron v. Couture, 24 Rev. Leg. 44.

III. Business and general brokers.
(See previous Annual Digests.)

BUILDING CONTRACTS.

See Contracts; Mechanics' Liens.

(§ I—10)—Failure to present claims.

Failure to present a claim, as provided for and required by the terms of a building contract, for work done, is, if urged and relied on, a complete bar to an action.

Gilbert Bros. Engineering Co. v. The King, 40 D.L.R. 723, 17 Can. Ex. 141.

[Affirmed by the Supreme Court of Canada.]

BUILDINGS.

Annotations.

Municipal regulations of building permits: 7 D.L.R. 422.

Restrictions in contract of sale as to the user of land: 7 D.L.R. 614.

BULK SALES.

See Sale, IV.

BY-LAWS.

Of Corporations, see Companies.

Of municipality, see Municipal Corporations.

CANALS.

See Waters; Harbours; Collision.

CANCELLATION OF INSTRUMENTS.

Of contracts generally, see Contracts, V.

Of subscription to corporate stock, see Companies.

Of deed, see Deed.

Revocation of will, see Wills.

Of contract of sale, see Vendor and Purchaser.

Of instruments under Land Titles Acts, see Land Titles.

Annotations.

Rescission of contract for fraud or misrepresentation: 21 D.L.R. 329.

Cancellation of share subscription for fraud or misrepresentation: 21 D.L.R. 103.

CANDIDATES.

See Elections; Officers.

CAPIAS.

See Arrest.

CARRIERS.

I. Who are common carriers; relation to public.

II. Carriers of passengers and other persons.
- A. In general.
- B. Rules and regulations.
- C. Who are passengers.
- D. Abuse of passengers; insulting language, etc.
- E. Assault.
- F. Arrest; false imprisonment.
- G. Measure of care required; negligence generally.
- H. Ejection of passenger or trespasser.
- I. Leaving at destination; stopover.
- J. Disabled or incompetent passengers.
- K. Getting on or off.
- L. Safety of stations, approaches, and platforms.
- M. Tickets; conditions; fares.
- N. Blackboard announcements as to trains; time-tables.
- O. Baggage or property of passenger.
- P. Corpse.
- Q. Connecting carriers.

III. Carriers of freight.
- A. In general; powers of agents.
- B. Duty to receive and transport.
- C. Loss of, or injury to property.
- D. Delivery by carrier; delay.
- E. Liability and lien for freight charges; rates.
- F. Carrying live stock.
- G. Stipulations as to liability.
- H. Contract or duty to furnish cars.
- I. Demurrage on cars.
- J. Connecting carriers.
- K. Criminal transportation.

IV. Governmental control; rates; discrimination; duty as to stopping places.
- A. In general.
- B. Compulsory connection and interchange of business; discrimination between carriers; hackmen, etc.; through rates.
- C. Rates; discrimination between passengers or shippers; rebates; passes.
- D. Duty as to depots; stopping trains; duty to run trains.

Annotations.

Regulation of rates: 26 D.L.R. 627.

The Crown as a common carrier: 35 D.L.R. 285.

I. Who are common carriers; relation to public.

See Railways; Street Railways; Railway Board; Shipping.

(§ I—4) — Ferryboat — Horse — Common fault—Damages.

Although a ferryman, who carries passengers and vehicles from one bank of a river to the other by means of a ferryboat towed by a gasoline yacht, is not a carrier, he is responsible for accidents caused by his negligence or faulty management of the boat. But one who takes on board such boat a horse hitched to a carriage should take precautions to assure its being quiet. Where both parties are negligent, there is common fault, and the damages should be divided.

Gauvin v. Legault, 24 Rev. Leg. 32.

II. Carriers of passengers and other persons.

C. Who are passengers.

(§ II C—35)—Injury to brakeman—Negligence—Crown.

The death of a brakeman while riding on a box car in the discharge of his duties on the Intercolonial Railway, occasioned by the

overturning of the car when it suddenly jumped the track, the roadbed and the car being in perfect condition and the train travelling at a moderate speed, must be regarded as an accident of an unforeseen event and is not attributable to the "negligence of any officer or servant of the Crown . . in or about the construction, maintenance or operation of the Intercolonial Railway," within the meaning of sec. 20 of the Exchequer Court Act.

Thibault v. The King, 41 D.L.R. 222, 17 Can. Ex. 366.

G. Measure of care required; negligence generally.

(§ II G—70)—Passenger stepping off train—Invitation to alight.

A conductor of a passenger train, who after telling a passenger that the next stop is his station, "where you get off," opened the door guarding the steps of the car, and allowed the passenger to go down the steps from which the passenger stepped off, while the train was still going at a high rate of speed, was not guilty of negligence; the conductor was entitled to assume that the passenger would act with ordinary prudence and discretion.

Grand Trunk R. Co. v. Mayne, 39 D.L.R. 691, 56 Can. S.C.R. 95, 22 Can. Ry. Cas. 218, reversing 34 D.L.R. 644, 39 O. L.R. 1.

(§ II G—96)—Street car—Negligence of motorman — Collision with work train—Injury to passenger.

An electric railway company which by the inexcusable negligence and breach of rules of one of its motormen, places the passengers of a car in a position of great peril from imminent danger of collision with a railway work train, is liable in damages for the death of one of the passengers who, becoming terrified, jumps or falls off the car and is killed by the train. The trainmen being suddenly faced with a new situation of danger which gave them little, if any time to think and act, even if they could have done anything more than was done to avoid the accident, are not required to possess the presence of mind which would enable them to do the best thing possible. A work train is not required to be equipped with air brakes.

Bartlett v. Winnipeg Electric R. Co. and Canadian Northern R. Co., (Man.) 43 D.L.R. 326, [1918] 3 W.W.R. 483.

(§ II G—101b)—Request to stop train—Directions to jump.

A request by a passenger to a brakeman to allow him to get off the train at a certain station, casts upon the brakeman the obligation of seeing that the proper steps are taken to have the train stopped, and upon the company the obligation of stopping it; if the brakeman acting within the apparent scope of his employment refuses to stop the train but slows it down, and allows the passenger to jump from it, telling him when to jump, the company is guilty of negligence and liable for resulting injuries, unless the train was travelling at such a speed that no reasonable man would jump from it even under the direction of a train official.

Hay v. Canadian Pacific R. Co., 40 D.L.R. 292, 11 S.L.R. 127, [1918] 2 W.W.R. 233. [Reversed by Supreme Court of Canada.]

(§ II G—114a)—Derailment of cars—Car defective—Proof.

The plaintiff was injured by the derailing of a passenger coach in which he was riding as a passenger on defendants' railway; the cause of the derailment was the breaking of an equalising bar. The court held that the maxim res ipsa loquitur applied and that, by proving that the car in which he was riding ran off the track, the plaintiff made a prima facie case of negligence, and that the duty then devolved upon the defendant to shew that the accident was not due to any fault or carelessness on its part. As carriers of passengers the defendants' undertaking was to exercise a high degree of care, and to carry safely as far as reasonable care and forethought could attain that end. The verdict of the jury that the negligence of the defendant consisted "in not having proper inspection or testing of equalizing bars, since it has been known of their breaking," was justified on the evidence.

Pyne v. Canadian Pacific R. Co. (Man.), 43 D.L.R. 625, [1918] 3 W.W.R. 913. [See 37 D.L.R. 751, 28 Man. L.R. 266.

K. Getting on or off.

(§ II K—225)—Passenger killed by train when alighting from another train at station—Invitation to alight—Countermand—Failure to bring to knowledge of passenger—Duty of conductor and trainmen to care for safety of passengers—Fatal Accidents Act—Damages.

Pesha v. Canadian Pacific R. Co., 14 O.W.N. 135.

O. Baggage or property of passenger.

(§ II O—329)—Check-room — Receipt — Limitation of liability.

The receipt of a railway company to a passenger delivering baggage to its parcels office for safe keeping, on payment of five cents, is not a contract of hiring, but a merely voluntary deposit or hiring of services, which renders the depositary or lessor liable for the loss of the deposited articles only in case of negligence; the burden of proof of such is on the depositing party. One who obtains the receipt, without informing himself of the conditions thereon limiting the company's liability, is guilty of negligence; and if such person is accustomed to travel on that railway and often makes use of the parcels office, the court will presume that he had knowledge of the conditions printed thereon.

Dorion v. G.T.R. Co., 53 Que. S.C. 106.

III. Carriers of freight.

C. Loss of, or injury to, property.

(§ III C—387)—Res ipsa loquitur—Connecting carrier—Evidence—Freight receipt—Limitation of liability.

Where the railway company to which goods are delivered for shipment undertakes the entire transportation, the connecting companies through whose hands the goods pass in the performance of the contract are the agents of the first company. Where goods are shown to have been delivered to a railway company for carriage and they are not delivered and no explanation is furnished, the rule of res ipsa loquitur applies: [Ferris v. C.N.R., 15 Man. L.R. 134, followed in Randall v. C.N.R., 21 D.L.R. 457.] Where a copy of a freight receipt issued by a railway company which has carried the goods covered by said receipt as agent for another railway company comes from the latter company's possession, it is admissible in evidence against the principal company in an action against it for non-delivery of goods, or part of the goods, shipped over its lines (see Randall v. C.N.R., 21 D.L.R. 457). A condition in a shipping bill that the railway company will not be responsible for any deficiency in the weight or measure of goods carried by it cannot be set up as a defence by the company when a loss is charged as happening through its own negligence: [Henry v. C.P.R., 1 Man. L.R. 210.]

Scanlin v. Canadian Pacific R. Co. (Man.), 44 D.L.R. 352, [1918] 3 W.W.R. 984.

(§ III C—390)—Loss of cargo—Water Carriage Act.

The owner of a seaworthy freight vessel is not liable under the Water Carriage Act (R.S.C. 1906, ch. 113, sec. 964) for loss of cargo due to the fault of navigation on the part of the captain of the tug towing such vessel.

Alex. McFee & Co. v. Montreal Transportation Co., 42 D.L.R. 714, 27 Que. K.B. 421.

D. Delivery by carrier; delay.

(§ III D—400)—Consignees delay in unloading — Notice to shipper — Charges—Action.

When a railway company has delivered to a consignee goods which it undertook to carry, it is not bound to notify the shipper of delay caused by the consignee in unloading, and of the costs incurred by the consignee in consequence. If the shipper subsequently pays such costs, to the discharge of the consignee, he has no action in repetition (i.e., money paid under a mistake) against the railway company.

Raine v. G.T.R. Co., 54 Que. S.C. 474.

(§ III D—410)—Shortage in delivery—Receipt—Prima facie evidence.

The plaintiff, intending to move his business from A. to T., sent a number of packages of goods to the railway station at A., and was allowed to place them in a car. A few minutes before his own departure from A., the plaintiff applied to the defendants' agent there for a shipping bill for the packages in the car. The agent handed him a bill but did not count the packages; the bill stated the number of packages, according to the plaintiff's statement, with the addition of "S. L. & C.," which was said to mean "shipper's load and count." The car was immediately sealed by the agent, with the packages uncounted. In due course the car arrived at T., accompanied by its way-bill, and when it arrived it had not been tampered with. It was unloaded by a checker, and it was found that there were four packages short of what were called for in the way-bill. The plaintiff was advised of the arrival of the car; he paid the freight, and delivery was made, the delivery-notice being marked "four pieces short." This was based upon the documents and the count made by the checker:—Held, that, as regarded the plaintiff, no effect could be given to the placing of "S. L. & C." upon the shipping bill, nor to the explanation given to him by the agent, that, there being no opportunity to count, his count would have to be accepted; also, that, while the shipping bill was a receipt for the goods, it was not conclusive, and might be controverted by evidence shewing that the goods were not received: the agent had no authority to make a contract of carriage binding on the defendants, save in respect of goods actually received by him; the receipt was prima facie evidence, and it was upon the defendants to explain it away. [Leduc v. Ward (1888), 20 Q.B.D. 475, 479; Smith & Co. v. Bedouin Steam Navigation Co., [1896] A.C. 70, followed.] And held, upon the evidence—weighing the preponderating probability, having regard to the burden of proof—that the defendants had delivered to the plaintiff all the goods that they actually received from him.

Nathanson v. G.T.R. Co., 43 O.L.R. 73.

G. Stipulations as to liability.

(§ III G—455)—Loss of part of shipment—Value.

Where the contract of shipment fixes the value of the goods shipped and limits the liability of the carrier to that value, in case of a loss of part of the shipment, the shipper may recover the real value of the property lost, not exceeding the limit of liability stipulated in the contract, and is not limited to a recovery of such proportion of the amount named in the contract as the value of the property destroyed bore to the value of all the property shipped. [Gibbon v. Paynton (1769), 4 Burr. 2298, 98 E.R. 199; Bradley v. Waterhouse (1828), 3 C. & P. 318; McCance v. London and N. W. R. Co. (1864), 3 H. & C. 343, distinguished.]

Spaner Bros. v. Central Canada Express Co. (Alta.), 43 D.L.R. 400, [1918] 3 W.W.R. 140.

I. Demurrage on cars.

(§ III I—475)—Tolls—Terminal—Traffic.

The holding of C.L. traffic until directions

are given to place upon a specific siding would involve great confusion, delay and loss, and would be impracticable owing to the large amount of space required for sufficient yardage at inportant terminal points. A toll of $3 was approved for diversion of cars at large terminals.

Montreal Board of Trade v. C.P.R. Co., 22 Can. Ry. Cas. 335.

IV. Governmental control; rates; discrimination; duty as to stopping places.

A. In general.

(§ IV A — 515) — Colonization lines— Branch—Transcontinental system— Mountain scale.

A "Mountain" scale of tolls may be authorized by the Board where the railway is a colonization line with but little developed traffic and bears to the transcontinental systems the relation of a branch line.

Re Edmonton, Dunvegan & British Columbia R. Co., 22 Can. Ry. Cas. 1.

Tolls—Increase—Standard and special —Railway Act.

Notwithstanding that standard tariffs of tolls have heretofore been filled with and approved by the Board as required by sec. 327 and that the increased tolls proposed by the applicants to be imposed under special tariffs of tolls are lower than those set out in such standard tariffs of tolls, the onus is nevertheless upon the applicants to shew cause for the increase of tolls under the present special tariffs of tolls which must prima facie be considered to have been fixed as fair and reasonable. To justify increase in tolls under special freight tariffs of tolls the applicants must shew that the existing tolls have been found to be unremunerative; that costs have increased; or that conditions or exigencies of traffic have changed; and only such increases will be authorized as are just and reasonable under existing conditions. The Board found that railway operating expenses had necessarily increased both per mile of line and per train mile, and that the percentage of increase of cost per train mile between 1899 and 1914 greatly exceeded the increase of earnings per train mile, notwithstanding greatly increased traffic and many economies effected by increased locomotive power, better grades and more effective loading. Having taken into consideration the position of the three chief railways respectively which are subject to the Board's jurisdiction in Eastern Canada, the Board found that no injustice could be done the shipper by selecting the actual results of the earnings of the Grand Trunk Railway Co., as a basis of tolls; but in so doing, the Board refused to take the capital cost of the line as carried on the company's books as a criterion, holding that traffic could not move under tolls fixed with reference to that cost, which included reconstruction charges, made inadequate allowance for depreciation and was excessive in comparison with the cost of lines recently constructed. Freight tolls in Eastern Canada should not be called upon to support investments by the Grand Trunk in the Grand Trunk Pacific or deficits upon operation of subsidiary lines in the United States, notwithstanding that these subsidiary lines supplied a large tonnage to be carried over the company's lines in Canada. In the interest of shippers and the public, railway companies should be allowed to charge tolls which will yield a return sufficient to provide facilities and rolling stock. The Board found that economies had been forced upon the Grand Trunk which must result in inferior accommodation and service, and which could not continue without great loss and inconvenience to the shipping and travelling public. Taking for comparison the capital cost respectively of certain lines recently built and allowing 6% as a fair interest return, the Board found that the earnings per mile of the Grand Trunk under existing tolls and conditions fell considerably short of the earnings required to provide adequate returns with reference to these standards. Tolls in Eastern Canada and in Western Canada should be brought to a parity, so far as this can reasonably be done. Loss of traffic by reason of competition of new lines, or the need of new lines themselves for traffic returns which would make them self-supporting, does not in itself justify increase of tolls. Advances in tolls cannot be allowed simply because the carriers require money; nor can percentage increases be authorized simply to augment revenue; each toll most be determined with regard to its reasonableness for services performed. On the facts presented, the Board found that in general a case for increase of tolls in Eastern Canada had been made out, and that increases should be made where the different industries could fairly and reasonably bear such increases.

Re Eastern Tolls, 22 Can. Ry. Cas. 4.

Tolls — Increase — Jurisdiction — War Measures Act.

The War Measures Act, 5 Geo. V. ch. 2, does not confer on the Board any jurisdiction to increase tolls, or to advise the Governor-in-Council to increase them, in aid of the finances of carriers; the Board's jurisdiction in that regard is that given by the Railway Act. The Act of the Parliament of Canada, 60-61 Vict. ch. 5, providing for a subsidy to the Canadian Pacific Ry. Co. in respect of the "Crow's Nest line" and for a limitation of freight tolls on lines then in operation between Fort William and points to the west thereof, is a special Act within the meaning of sec. 3 of the Railway Act. It therefore over-rides any provisions of the Railway Act inconsistent with it and limits the general jurisdiction of the Board as to tolls. The Board has no power to advance tolls on the Canadian Pacific Railway within that territory beyond the maximum fixed by the special Act. The Act of the Legislature of Manitoba (Manitoba statutes, 1901, ch. 39) limiting tolls to be charged over lines of the Canadian Northern Railway System within that

province is ultra vires as regards the Canadian Northern Ry. Co., a Dominion corporation; and as regards subsidiary companies incorporated by the province and subsequently declared to be for the general advantage of Canada; it is superseded by the Railway Act in so far as the two are inconsistent and also by 1 Edw. VII. ch. 53, sec. 3 (Dom.); so that the Board's general jurisdiction under the Railway Act as to tolls is not limited or affected thereby. The Board, in considering tolls to be authorized, declined to give effect to an agreement to limit tolls made between a railway company and a province and confirmed by provincial legislation, where the company had afterwards passed under Dominion jurisdiction, and the agreement if observed would either have prevented an increase of tolls necessary in the public interest, or resulted in discriminatory lower tolls in that province as compared with other provinces with similar conditions. [Crow's Nest Pass Coal Co. v. Canadian Pacific Ry. Co., 8 Can. Ry. Cas. 33, at p. 41; Regina Board of Trade v. Canadian Pacific and Canadian Northern Ry. Co. (Regina Toll Case), 11 Can. Ry. Cas. 380, at p. 391, followed.] The Board can neither order nor enforce tolls which are unremunerative to the carriers without infringing the principle of the Railway Act by denying carriers a fair and just toll. An unduly low rate constitutes an unreasonable rate just as much as an unreasonably high one, and the question whether a rate is unduly low or unduly high can only be determined with a knowledge of the cost entailed by the service. An agreement to limit tolls entered into by a railway company will not be enforced or regarded by the Board unless made binding upon the Board by valid enactment, if it is found that the tolls agreed upon are unremunerative and improvident, so that the railway cannot be properly maintained and operated. In the public interest, when tolls reserved by contract prove unreasonably low in the face of changed conditions and increased costs, the tolls must be made reasonable notwithstanding the contract. [British Columbia Pacific Coast Cities v. Canadian Pacific Ry. Co. (Vancouver Interior Rates Case), 7 Can. Ry. Cas. 125, at p. 146, followed.] Holding that under 60-61 Vict. ch. 5, it could not increase rates beyond the maximum rates thereby fixed on lines of the C.P.R. Co. in operation when that Act was passed, the Board also held that to prevent discrimination the same maximum should be applied to the whole system of that company as now operated; and that similar rates must be applied to other railways in the territory affected. The Board, having regard to increased cost of maintenance and operation and finding that tolls theretofore charged had been unremunerative and insufficient to ensure a proper service, authorized the railway companies concerned to submit new standard freight and passenger tariffs providing for a general increase of maximum mileage tolls on a percentage basis, subject to the Crow's Nest Pass agreement and statute (60-61 Vict., ch. 5), and to certain provisions and exceptions set out in the judgment of the Board.

Re Increase in Passenger and Freight Tolls, 22 Can. Ry. Cas. 49.

TOLLS — MEASURE — COMPARISON — REASONABLENESS.

The toll charged by one carrier is not necessarily a measure of what another should charge. Conversely it would appear that where different schedules are voluntarily adopted the higher toll existing on one railway is no conclusive measure of the toll properly chargeable for the same distance by the other carrier. [Dominion Sugar Co. v. Canadian Freight Association, 14 Can. Ry. Cas. 188, at p. 192, followed.] A consideration of the tolls in themselves, as well as a comparison with those the Board has found reasonable, shews that a toll from Hagersville to Windsor on a 65 cent basis is out of line, therefore a toll not exceeding 75 cents from Hagersville to Windsor is reasonable. [Doolittle & Wilcox v. Grand Trunk and Canadian Pacific Ry. Cos. (Stone Quarry Toll Case), 8 Can. Ry. Cas. 10, followed.]

Hagersville Crushed Stone Co. v. Michigan Central R. Co., 22 Can. Ry. Cas. 84.

TOLLS—JOINT—INCREASE—TRAFFIC.

The railway companies having filed cancellations of a large number of joint tariffs, the effect being to increase tolls by substituting the sum of the local tolls for the joint tolls formerly in force, the Board intimated that the action was objectionable and would not be allowed. Subsequently, after a hearing, it directed that the joint tolls and service be maintained, and that the companies should file joint tariffs setting out tolls based upon the increase authorized by the Board in the Eastern Rates Case, 22 Can. Ry. Cas. 4.

Canadian Freight Association v. Montreal Board of Trade, 22 Can. Ry. Cas. 88.

TOLLS — WATER COMPETITION — TERMINAL CHARGES.

A tariff quoting a toll from Sorel to Montreal on steel forgings "issued to meet water competition," but which does not limit the movement under it, covers either a local movement to Montreal or to the ship-side at Montreal for export, and a further charge to cover "terminal charges" at Montreal cannot be supported under it.

Munitions and Machinery v. Quebec, Montreal and Southern R. Co., 22 Can. Ry. Cas. 90.

TOLLS — DEMURRAGE — INSPECTION — DELAY—GRAIN ACT.

Carriers are entitled to recover demurrage tolls for detention of equipment owing to delay in inspection of grain by Government officials, and the shipper has the right, under the Canada Grain Act, 2 Geo. V. ch. 27, sec. 71, to recover from the inspector for neglect or refusal to inspect.

The latter are liable to shippers under the

Canada Grain Act, 2 Geo. V. ch. 27, sec. 71, for neglect or refusal to make such inspection.

Toronto Board of Trade v. Canadian Freight Ass'n., 22 Can. Ry. Cas. 93.

TOLLS — ICING IN TRANSIT — REFRIGERATOR CARS—ACTUAL COST.

Railway companies should not profit by shipments handled except as carriers. The tolls for in transit icing of refrigerator cars should be made up on the basis of the average actual cost of the ice and the placing thereof upon the cars. Upon an analysis of the different cost factors the proposed increase in the icing tolls is not justified. The tolls on salt in refrigerator cars owing to the gradual development of its use in connection with the packing industry have been treated as an incident of its refrigeration, and it is claimed is properly included in the icing toll therefor. The carriers have justified the toll for salt over and above a toll for icing in the tariffs of tolls now in force. [Ontario Fruit Growers Association v. Canadian Pacific Ry. Co. (Canadian Freight Association) (Fruit Growers case), 3 Can. Ry. Cas. 430, distinguished and followed.]

Ontario Fruit Growers Association and Packing House Cos. v. Canadian Freight Ass'n., 22 Can. Ry. Cas. 98.

SWITCHING—SPURS.

The Board disallowed a toll of $2 for switching and spotting movements on spurs more than 1,000 feet in length of cars loaded with coal, without expressing any opinion on the general question of fixing a limit for free switching service.

Premier Coal Co. v. Canadian Freight Ass'n., 22 Can. Ry. Cas. 123.

B. COMPULSORY CONNECTION AND INTERCHANGE OF BUSINESS; DISCRIMINATION BETWEEN CARRIERS, HACKMEN, ETC.; THROUGH RATES.

(§ IV B—520)—TRAFFIC—INTERCHANGE—SENIOR AND JUNIOR—COST.

The general pactice of the Board when an application is made for an interchange track for the purpose of interchanging traffic, where it appears that the effect of establishing such interchange is to subdivide the traffic by diverting it from the older line, is to place the full cost of construction and maintenance on the junior line.

Grand Trunk Pacific R. Co. v. C.P.R. Co., 21 Can. Ry. Cas. 187.

TRAFFIC — INTERCHANGE — TRANSFER TRACK — REMOVAL — ROLLING STOCK.

The Board may authorize the removal of a transfer track used for the interchange of traffic, when the interchange can be done at another point, resulting in economy of rolling stock movement in the public interest, thus relieving the strain on the existing facilities by removing the track and using the rails and ties at other points where there is urgent need.

Canadian Pacific R. Co. v. Saskatoon and Moosejaw Boards of Trade, 22 Can. Ry. Cas. 349.

C. RATES; DISCRIMINATION BETWEEN PASSENGERS OR SHIPPERS; REBATES; PASSES.

(§ IV C—525)—WATER COMPETITION.

It is not contrary to the Railway Act that carriers should meet water competition in a measure when it is effective and afterwards meet it in a less degree when it is less effective.

Dominion Canners and Glassco v Canadian Freight Ass'n., 22 Can. Ry. Cas. 312.

DISCRETION—TOLLS—WATER COMPETITION.

Carriers may in their discretion meet water competition by reducing tolls; they may also in their discretion restore tolls to a normal basis when water competition ceases. [Dominion Millers Association v. Grand Trunk and Canadian Pacific Ry. Cos., 12 Can. Ry. Cas. 363, at p. 368, followed.]

Regina Board of Trade v. C.P.R. Co., 22 Can. Ry. Cas. 315.

DISCRETION — TOLLS — REDUCTION — WATER COMPETITION.

Tolls reduced by a railway company to meet water competition may, at the discretion of rail carriers, be brought up more closely to the normal level when water competition becomes less effective. [Dominion Millers Association v. Grand Trunk and Canadian Pacific Ry. Cos., 12 Can. Ry. Cas. 363, at p. 368; In re Western Tolls (Western Freight Rates Case), 17 Can. Ry. Cas. 123, at pp. 123, 124, 159, 166, followed. Canadian Oil Cos. v. Grand Trunk, Canadian Pacific and Canadian Northern Ry. Cos., 12 Can. Ry. Cas. 350, at p. 351. Blind River Board of Trade v. Grand Trunk, Canadian Pacific Ry., Northern Navigation and Dominion Transportation Cos., 15 Can. Ry. Cas. 146. Boards of Trade of Montreal and Toronto and Canadian Manufacturers Association v. Canadian Freight Association, 21 Can. Ry. Cas. 77, referred to.]

Boards of Trade of Western Cities and Canadian Manufacturers' Ass'n. v. Canadian Freight Ass'n., 22 Can. Ry. Cas. 324.

FACILITIES — TRANSPORTATION — COMPETING LINES — CARS — SHORTAGE—EQUIPMENT.

Shippers located on one line of railway are not entitled to as good transportation facilities as if located on two or more competing lines. In times of car shortage it is the duty of a carrier to retain its equipment so as to serve shippers on its own line. [Canadian Pacific Ry. Co. v. Nelson & Fort Sheppard Ry. Co., 11 Can. R . Cas. 400, followed.] The initial or originating carrier is entitled to as long a haul as reasonable on its own lines. [Imperial Steel & Wire Co. v. Grand Trunk Ry. Co., 11 Can. Ry. Cas. 395; Canadian Pacific Ry. Co. v. Nelson & Fort Sheppard Ry. Co. (Memorandum), 11 Can. Ry. Cas. 400; Jacobs Asbestos Co. v. Quebec Central Ry. Co., 19 Can. Ry Cas. 357; Plymouth, Devonport & South Western Junction Ry. Co. v. Great Western Ry. Co., 10 Ry. & Ca. Tr. Cas. 68; Riddle v. Pittsburgh & Lake Erie Ry. Co., 1 I.C.C.R. 374, followed.] The Board laid down the following rules for

the movement of coal, not only to points on the originating line but also to points on other lines: (a) Cars must be supplied for this purpose as well as for delivery at points on the originating line to the full extent cars are available; (b) where the originating or receiving line enjoys the long haul it must supply the cars; (c) where the line that ought to supply the cars is unable to do so, then the other line although not enjoying the long haul should supply the cars and be paid by the defaulting line a per diem toll of $1.25 instead of 45 cts. from the time the car leaves until it is returned to the owning line, but no existing freight toll may be increased to cover the additional per diem toll; (d) it is the duty of the receiving line to return the cars promptly to the owning line, either at the junction point where the car was received or, in case return loads can be obtained, to another junction point on the line of the return movement. To provide for an emergency due to shortage of equipment and scarcity of coal, railway companies without sufficient equipment were ordered to make forthwith the necessary changes in flat or live stock cars to enable them to carry coal.

Re Coal Transportation Facilities, 22 Can. Ry. Cas. 338.

CLASSIFICATION—COST OF TRANSPORTATION —LUXURIES.

Classifications must be arranged according to the ability of the various articles to bear their share of the cost of transportation to admit of cheaper goods being carried any distance; thus luxuries which move in comparatively small quantities, are given a higher classification than indispensables. While the present war conditions may affect tolls per se these should have no bearing on classification.

Horne Co. v. Canadian Freight Ass'n., 22 Can. Ry. Cas. 344.

CLASSIFICATION — WEIGHTS — MINIMUM — COMMODITY.

Fibre board cheese boxes, rated in the classification as fifth class with a minimum weight in C.L. lots of 20,000 lbs., are entitled to the same rating as wooden cheese boxes with the same minimum weight, either by a change in the classification or by a commodity toll of general application.

Canada Cheese Box Co. v. Canadian Freight Ass'n., 22 Can. Ry. Cas. 347.

JURISDICTION — INTERNATIONAL TRAFFIC — EXPORT—PARITY—CLASSIFICATION.

The Board has no jurisdiction to vary or modify the U.S. official classification in the case of C.L. traffic moving from a Canadian point to a Canadian port, and, under sec. 321 (2, 3, 4), the only jurisdiction the Board has is when such classification is used with respect to traffic to or from the United States, and the carriers, being under no statutory obligation to use the classification, may, in their discretion, with the leave of the Board, do so on export business from Canadian points to Canadian ports in order to assure a parity of treatment as to tolls and ports in the United States. Subject to the provisions of the Railway Act in respect to unjust discrimination, it is entirely within the discretion of carriers whether they shall or shall not fix tolls to meet the competition of markets. When export tolls have been installed the Board has directed their continuance or re-establishment to maintain a parity of ports, but the Board will not direct export tolls to be put into force where no such tolls have existed. [Montreal Produce Merchants Association v. Grand Trunk and Canadian Pacific Ry. Cos., 9 Can. Ry. Cas. 232; British Columbia Sugar Refining Co. v. Canadian Pacific Ry. Co., 10 Can. Ry. Cas. 169, at p. 172; Canadian Lumbermen's Association v. Grand Trunk and Canadian Pacific Ry. Cos., 10 Can. Ry. Cas. 306, at p. 319; Canadian Oil Cos. v. Grand Trunk, Canadian Pacific and Canadian Northern Ry. Cos., 12 Can. Ry. Cas. 350, at p. 356; Edmonton Cloverbar Sand Co. v. Grand Trunk Pacific Ry. Co., 17 Can. Ry. Cas. 95, at p. 97, followed. British American Oil Co. v. Grand Trunk Ry. Co. (Stoy Oil case), 9 Can. Ry. Cas. 178, at p. 184; Dominion Millers Association v. Grand Trunk and Canadian Pacific Ry. Cos., 12 Can. Ry. Cas. 363, referred to.]

Graham Co. v. Canadian Freight Ass'n., 22 Can. Ry. Cas. 355.

INTERNATIONAL TRAFFIC — TOLLS — CONTINUOUS ROUTE.

The rule that a joint or through toll between any two points properly filed is the only legal toll in respect of the particular traffic between such points, applies also to international traffic, where a joint tariff of tolls for a continuous route has been filed for part of the distance, the through toll for the continuous route plus the local toll to the point beyond the end of the continuous route is the only toll that can be charged.

General Traffic Service Co. v. C.P.R. Co., 22 Can. Ry. Cas. 372.

EXPRESS—LIMITS—ZONES—SCALE.

Municipal boundaries may usually be taken as suitable limits for free express delivery service, in villages, towns and small cities, but not in large cities where municipal boundaries are enlarged from time to time. The Board established a central zone in Toronto with free pick up and delivery service. Outside of the central zone, additional areas, as a toll zone, were established in and about Toronto comprising any place within half a mile from the nearest free zone limit, except the southern limit on the water front. A graduated scale of charges, according to weight, was fixed for delivery of parcels in the toll zone. After a year's operation a report is to be made to the Board, upon which a revision of conditions may be made if deemed necessary by the Board.

City of Toronto and Citizens Committee v. Express Traffic Ass'n., 22 Can. Ry. Cas. 375.

TOLLS — AGREEMENT — SPUR — CARS — INTERSWITCHING.

The Board is not bound, nor may the provisions of the Railway Act be defeated, by an agreement between two railway companies respecting tolls. A provision in an agreement made in 1901 between two railway companies, whereby the former in consideration of the latter undertaking to build a spur from its line to a pulp mill, agreed to build a connection between the two lines and switch loaded and empty cars for the latter company at $1.50 per loaded car, was abrogated by the Board in 1917, the tolls being found unremunerative, and the regular interswitching charge of 1 cent per 100 lbs. applied under the General Interswitching Order No. 4988. [Crow's Nest Pass Coal Co. v. Canadian Pacific Ry. Co., 8 Can. Ry. Cas. 33; Lake Superior Paper Co. v. Algoma Central & Hudson Bay Ry. Co., 22 Can. Ry. Cas. 361, followed. Village of Fergus v. Grand Trunk Ry. Co., 18 Can. Ry. Cas. 42, distinguished.]

Canadian Pacific R. Co. and Spanish River Pulp & Paper Mills v. Algoma Eastern R. Co., 22 Can. Ry. Cas. 381.

INCREASE — "SPREAD" BETWEEN COMPETITORS—RAIL AND WATER TOLLS.

The Board will not authorize an increase of remuneration in lake and rail tolls for the purpose of lessening a prohibitive "spread" between them and all-rail tolls of the same and other carriers between the same points, in order to induce part of the traffic to move all rail and so to prevent the all-rail tolls from being "cut" by a carrier having no lake and rail route and desiring to participate in the traffic. Having regard to the decision in the Eastern Rates Case allowing an increase in general freight tolls east of Fort William, 22 Can. Ry. Cas., 4, and the reasons for that decision the Board held that reasonable increases in the tolls on grain and grain products east of Fort William should be allowed and approved revised tolls accordingly.

Dominion Millers Ass'n. v. G.T. and C.P.R. Cos., 22 Can. Ry. Cas. 393.

MAIL ORDER BUSINESS — DISTRIBUTING POINTS.

Lower or joint tolls will not be granted to a retail dealer, in a distant point (such as Winnipeg), seeking to do a mail order business (L.C.L. lots) through a well-established distributing point (such as Edmonton, 848 miles from Winnipeg), into territory tributary thereto (the Peace River Country), which would give the shipper a toll lower than the local toll at the distributing point (Edmonton). [In re Western Tolls (Western Tolls case), 17 Can. Ry. Cas. 123, at p. 156; In re Edmonton, Dunvegan & British Columbia Ry. Co. (Mountain Scale Tolls case), 22 Can. Ry. Cas. 1, referred to.]

Newman v. Edmonton, Dunvegan & British Columbia R. Co., 22 Can. Ry. Cas. 399.

CLASSIFICATION — DISTRIBUTING POINTS.

Two L.C.L. classification ratings will not be granted on the same commodity differing in value. Where a C.L. classification rating from Wallaceburg, a manufacturing centre, to Winnipeg was voluntarily put in by the carriers, it is only reasonable that similar commodity tolls should be given from Wallaceburg to Toronto and Montreal, similar distributing centres in the east. [Ledoux Co. v. Canadian Freight Association, 12 Can. Ry. Cas. 3, distinguished.]

Wallaceburg Cut Glass Works v. Canadian Freight Ass'n., 22 Can. Ry. Cas. 408.

TOLLS —JOINT — FOREIGN COUNTRY.

Under sec. 336 a joint tariff of tolls must be filed covering a continuous route traffic movement from a point in a foreign country into Canada. Without passing on the question of the jurisdiction of the Board to regulate a through toll from a point in the United States to a point in Canada, it may be said in general that where a through toll is attacked as being unreasonable because it is in excess of the sum of the locals the Board has jurisdiction only as far as to direct a reduction for the future, but possesses no power to direct a refund of a portion of the toll charged.

Security Traffic Bureau v. C.N.R. Co., 22 Can. Ry. Cas. 414.

(§ IV C — 535) — JURISDICTION — TOLLS — REASONABLENESS — EXPERIMENTAL-INDUSTRY—DEVELOPMENT.

The jurisdiction of the Board is confined to dealing with the reasonableness of tolls, and it is not its function to put in experimental tolls with a view to developing industry. [British Columbia News Co. v. Express Freight Traffic Association, 13 Can. Ry. Cas. 176, at p. 178, followed.]

Southern Alberta Hay Growers v. C.P.R. Co., 21 Can. Ry. Cas. 226.

TOLLS—COMPARISON—MOVEMENT.

Tolls for crushed stone of $1.10 and 70 cents per ton from Burritts, Ontario, to Montreal, 121 miles, and to Ottawa, 34 miles, respectively, were found not to be unreasonable in comparison with other tolls in force in the same territory and the large movement of crushed stone thereunder. [Doolittle & Wilcox v. Grand Trunk and Canadian Pacific Ry. Cos. (Stone Quarry Toll case), 8 Can. Ry. Cas. 10, at p. 13, distinguished.]

Provincial Stone & Supply Co. v. C.P.R. Co., 22 Can. Ry. Cas. 411.

TOLLS — REASONABLENESS — CONTRACT — ADEQUACY OF CONSIDERATION.

The Board will not consider adequacy of consideration in a contract as any justification for favoured treatment by a carrier of a shipper in respect of tolls. [Crow's Nest Pass Coal Co. v. Canadian Pacific Ry. Co., 8 Can. Ry. Cas. 33, at pp. 40, 41, followed.] While it is proper to take into consideration the period a toll has been established, the investment of capital made in the belief that

such toll would continue and the further commitments made, there is no property in a toll, mere continuance is only one factor, its general reasonableness must be considered. [International Paper Co. v. Grand Trunk, Canadian Pacific and Canadian Northern Ry. Cos. (Pulpwood case), 15 Can. Ry. Cas. 111, followed.] The through toll or the division of the through toll between two points is not necessarily a test of the reasonableness of the local toll to an intermediate point. A blanket toll put in for development of traffic, with but little attention to the resultant profit, does not create an obligation to continue an unduly low toll basis. [International Paper Co. v. Grand Trunk, Canadian Pacific and Canadian Northern Ry. Cos. (Pulpwood case), 15 Can. Ry. Cas. 111, followed.] The Board found that the tolls charged by the respondent for the shorter hauls are lower as compared with other carriers in Eastern Canada, and having regard to the nature and volume of traffic, the tolls and scaling in the tariffs of tolls are not unreasonable.

Lake Superior Paper Co. v. Algoma Central & Hudson Bay R. Co., 22 Can. Ry. Cas. 361.

(§ IV C—542)—UNJUST DISCRIMINATION—MILLING IN TRANSIT—COMMON MARKET.

It is unjust discrimination to charge a higher milling-in-transit toll on the same commodity moving from different localities by different routes under similar circumstances and conditions to a common competing market. [Ontario & Manitoba Flour Mills v. Canadian Pacific Ry. Co., 16 Can. Ry. Cas. 430, at p. 431, referred to.]

Dominion Millers Association v. Canadian Freight Ass'n., 22 Can. Ry. Cas. 125.

TERMINAL — UNJUST DISCRIMINATION — JURISDICTION — AMENDMENTS AND SUPPLEMENTS.

Where no unjust discrimination is shewn among shippers, it is not the function of the Board to exercise its jurisdiction by inquiring into the status of connecting carriers, approving amendments and supplements to the tariffs of tolls of the line carriers engaged in international traffic for the purpose of removing a terminal carrier as a participator on the ground that it is of the character known in the United States as an industrial railway. The Essex Terminal Ry. Co. (incorporated 2 Edw. VII., ch. 62) was found by the Board upon the evidence not to be an industrial railway within the terms of the Industrial Railways Case, 29 I.C.C.R. 212. Amendments to the tariffs of line carriers engaged in international traffic removing the Essex Terminal as a participating carrier therefrom were suspended.

Essex Terminal Ry. Co. v. G.T., M.C. Wabash and N.Y.C.R. Cos., 22 Can. Ry. Cas. 301.

UNJUST DISCRIMINATION — JURISDICTION — REFUND.

It is unjust discrimination, other things being equal, to charge a higher toll from one point of origin as compared with another, at practically the same distance from the same point of destination. The Board has no jurisdiction to direct a refund of a portion of a toll charged and collected under a tariff legally in force. [Montreal Board of Trade v. Grand Trunk and Canadian Pacific Ry. Cos., 14 Can. Ry. Cas. 351; Dominion Sugar Co. v. Grand Trunk, Canadian Pacific, Chatham, Wallaceburg & Lake Erie and Pere Marquette Ry. Cos., 17 Can. Ry. Cas. 240, at p. 247, referred to.]

Midland Lumber Shippers v. G.T.R. Co., 22 Can. Ry. Cas. 387.

COMPETITION BY WATER—UNJUST DISCRIMINATION.

It is not unjust discrimination nor undue or unreasonable prejudice or disadvantage under secs. 315 (5), 318, for a carrier to charge lower than normal toll from the point of shipment to a destination point owing to effective water competition, than on shipments from the same point to an intermediate point where such competition is not effective.

City of Chatham and Chatham Board of Trade v. Canadian Pacific R. Co., 22 Can. Ry. Cas. 391.

D. DUTY AS TO DEPOTS; STOPPING TRAINS; DUTY TO RUN TRAINS.

(§ IV D—550)—TRAIN SERVICE—ELECTRIC RAILWAYS.

Suburban populations, usually dependent on electric railways for ingress and egress to and from large cities, should have a satisfactory train service.

East Greenfield Park v. Montreal & Southern Counties R. Co., 21 Can. Ry. Cas. 208.

TRAIN SERVICE—STEAM AND ELECTRIC—BREACH OF AGREEMENT—JURISDICTION.

Where respondent steam lines have been paralleled by electric lines, which have taken practically all the business, and ordering the respondent to give an increased service, might secure a better service from the electric line, such an order would not be justified in the public interest, where this could only be done at an unjustifiable cost and entail a continuing loss to the respondent. A specific breach of an agreement must be shown to give the Board jurisdiction under 8 & 9 Edw. VII., ch. 32, sec. 1.

City of Hamilton v. G.T.R. Co., 21 Can. Ry. Cas. 211.

FLAG STATIONS—AGENTS—EARNINGS.

The practice of the Board is not to direct that a flag station shall be made an agency point unless there is a business of $15,000 per annum at the point in question. Carriers with a view to expanding business, have a wider discretion to make ventures in creating agency points than the Board. Where the earning power of a carrier at a station is low the matter to be considered is what accommodation it is reasonable for the public to expect.

Re Lower Argyle Station, 21 Can. Ry. Cas. 434.

FACILITIES — FLAG STATION — THROUGH TRAFFIC.

In adjudicating on the location of stops the Board will take into consideration the average of convenience to the public and the obligation of the carriers to afford reasonable facilities, having in view the nature of traffic on the railway, and will give due regard to the effect of additional stops on the ability of the carriers to give efficient through service in competition with other lines. The general intention of the Railway Act is that the initial discretion as to the location of stations shall be with the carrier. The Board is justified in intervening only when there has been an unreasonable exercise of this discretion, or when there are exceptional circumstances.

Hartin et al. v. C.N.R. Co., 21 Can. Ry. Cas. 437.

TRAIN SERVICE—LOSS OF REVENUE—DIVERSION OF TRAFFIC.

It would not be reasonable to compel a carrier to operate its train service in connection with a competing carrier and thus lose revenue by the diversion of its traffic to its competitor, if it can handle it as well, or reasonably as well, over its own lines.

Cole et al. v. C.N.R. Co., 22 Can. Ry. Cas. 429.

TRAIN SERVICE — AGREEMENT — PASSENGER AND FREIGHT — STATION — JURISDICTION—PUBLIC INTEREST.

By agreement between the Grand Trunk and Canadian Pacific Ry. Cos., dated May 13, 1896, confirmed by statute, 59 Vict., ch. 6 (C), the Canadian Pacific were given a lease for a period of 50 years of the joint use of the Grand Trunk line between Hamilton Junction and the city of Toronto, known as the "Joint Section." By the 16th clause of the agreement, the Canadian Pacific agreed to do through passenger and freight business over the joint section, but not local business between either Hamilton or Toronto and an intermediate station on the joint section. Oakville is a town on the joint section, with a population of over 3,000 inhabitants, about 21 miles west of Toronto. Many of its residents have their offices or places of business in Toronto. For many years the Grand Trunk Ry. Co. gave a fairly satisfactory suburban service between Oakville and Toronto, until in January, 1917, the 11.45 p.m. train out of Toronto was discontinued to economise fuel, and the Canadian Pacific voluntarily agreed to stop its 7.15 p.m. train out of Toronto for Buffalo. In June, 1917, the Grand Trunk re-established its 11.45 p.m. train and discontinued it again in September, 1917. The Canadian Pacific being unwilling, the Board ordered its 7.15 p.m. train out of Toronto to stop at Oakville. Assistant Chief Commissioner:—The confirmatory Act is not a special Act within the meaning of sec. 3 of the Railway Act, but merely validated a private arrangement between two railway companies and, does not make any enactment affecting the general public. Commissioner McLean:—The confirmatory Act is a special Act within the meaning of sec. 3 of the Railway Act, but there is no such repugnancy between the provisions of the special Act and the Railway Act as to oust the jurisdiction of the Board in matters of train service. [Grand Trunk and Canadian Pacific Ry. Cos. v. City of Toronto (Viaduct case), 11 Can. Ry. Cas. 38, at p. 39; Municipality of La Salle v. Canadian Pacific and New York Central Ry. Cos., 20 Can. Ry. Cas. 190, at pp. 192, 193, followed.]

Town of Oakville v. G.T. & C.P.R. Cos., 22 Can. Ry. Cas. 433.

CAVEAT.

See Land Titles; Vendor and Purchaser.

CEMETERIES.

AGREEMENT UNDER SEAL BETWEEN OWNER AND MUNICIPAL CORPORATION—COVENANT BY OWNER TO PAY ANNUAL SUM TO CORPORATION—CONSIDERATION — COVENANT BY CORPORATION NOT TO PREVENT OR PROHIBIT USE OF CEMETERY FOR INTERMENT OF DEAD IN ALL TIME TO COME—CEMETERY ACT, SEC. 37—UNLAWFUL COVENANT—FAILURE OF CONSIDERATION—OWNER NOT BOUND BY ITS COVENANT.

Town of Eastview v. Roman Catholic Episcopal Corporation, 15 O.W.N. 211.

CERTIORARI.

I. JURISDICTION; USE OF WRIT GENERALLY.
   A. In general.
   B. Existence of other remedy.
II. PROCEDURE; HEARING; DETERMINATION.

Annotation.

Prosecution for same offence after conviction or commitment quashed on certiorari: 37 D.L.R. 126.

I. Jurisdiction; use of writ generally.

A. IN GENERAL.

(§ I A—1)—MUNICIPALITIES ACT—BY-LAWS—REGULARITY OF PROCEEDINGS.

An application by way of certiorari to quash a decision of a County Council will be refused when the Council has acted in accordance with the Municipalities Act, N.B., 2 Geo. V., 1912, and the by-laws of the municipality, and there has been no gross miscarriage of justice.

Ex parte Fawcett, 39 D.L.R. 296, 45 N.B.R. 324.

RIGHT OF APPEAL.

Where no appeal is given, the case may be evoked before judgment, or the judgment may be revised by means of a writ of certiorari.

Henry Morgan Co. v. City of Montreal, 24 Rev. Leg. 486.

(§ I A—2)—Non-compliance with criminal code—Appellate Court quashing.

An Appellate Court on certiorari will quash an order of a justice under the Master and Servants Ordinance where the proceedings have not complied with the provisions of part 15 of the Criminal Code.

Dierks v. Altermatt, 39 D.L.R. 509, 13 A.L.R. 216, [1918] 1 W.W.R. 719.

Magistrate's conviction — Crown practice rules.

In cases to which Nova Scotia Crown Rule 32 does not apply, a motion to quash a magistrate's conviction as upon certiorari cannot be made without the conviction being brought into the superior court, even where the issue of a writ of certiorari is waived by the prosecutor. Unless the convictions are brought into court there is no jurisdiction to deal with them, and in cases to which Crown Rule 32 (N.S.) applies the order to quash is effective only upon a return being made.

Rex v. Rusko (N.S.), 29 Can. Cr. Cas. 433.

(§ I A—3)—Conviction for obstructing peace officer—Intoxicating Liquor Act—Appeal.

A certiorari will not lie to remove a conviction for resisting or wilfully obstructing a peace officer in the execution of duty, whether the complaint is laid and conviction made for an offence under sec. 169 of the Criminal Code, 1906, or sec. 153 of the "Intoxicating Liquor Act, 1916," unless under the former Act there are exceptional circumstances, because an appeal is provided under sec. 749 of that Act, or under the latter Act because certiorari is taken away by sec. 111 of that Act, and the ground relied upon to quash does not go to the jurisdiction. Under the present practice as to certiorari objection to the writ may be made on the return of the rule nisi to quash.

The King v. O'Brien, 45 N.B.R. 275.

Conviction — Evidence — Previous offence—Identity.

An accused found guilty of a second offence, may by way of certiorari, obtain the annulment of the judgment pronounced against him, if the record contains no evidence of the first offence or of the identity of the accused with the person condemned the first time. Any extra-judicial knowledge which a magistrate may have of the first offence, or of the identity of the person found guilty, cannot take the place of evidence of such fact.

Duberger v. Morkill, 20 Que. P.R. 49.

Adulteration Act—Sentence to hard labour—Costs—Public officer.

A sentence of hard labour in default of payment of the fine imposed by sec. 31 of the Adulteration Act will be set aside on certiorari. A public officer who has succeeded before a magistrate will not be condemned to the costs of the certiorari issued against the conviction which he has secured.

Therrien v. Leet, 19 Que. P.R. 380.

Game law of Quebec—Evidence.

If an accused, found in possession of furs, claims that the animals were not killed in the province, a writ of certiorari cannot be had against the conviction of the accused after hearing evidence on this point.

Halpern v. St. Cyr, 20 Que. P.R. 65.

Conviction without hearing — Record — Improbation.

If an accused, in a petition for certiorari, alleges that he has been condemned without being heard, and if the documents filed with the magistrate's report declare that the accused has been duly called, the petitioner applying for the writ of certiorari may proceed by improbation against such documents.

Lajeunesse v. Court Recorder of the City of Maisonneuve, 19 Que. P.R. 333.

(§ I A—9)—Power to look at depositions.

In view of the express provision of the Manitoba Temperance Act, 6 Geo. V. Man., ch. 112, preserving the right to certiorari although denying any right of appeal from a summary conviction under it, and the references contained in it (secs. 100 and 101) to the sufficiency of the evidence to support the case and the disposal of a certiorari application upon the merits, the Court hearing a certiorari application is bound to look at the evidence taken before the magistrate in conformity with secs. 682 and 683 of the Criminal Code to see whether there is evidence or not to prove the offence. [R. v. Brady, 13 Ont. R. 356; R. v. Borin, 22 Can. Cr. Cas. 248, 15 D.L.R. 737, 29 O.L.R. 584; R. v. Covert, 28 Can. Cr. Cas. 25, 34 D.L.R. 662; R. v. Emery, 27 Can. Cr. Cas. 116, 33 D.L.R. 556, discussed.]

Rex v. Hoffman, 38 D.L.R. 289, 28 Man. L.R. 7, 28 Can. Cr. Cas. 355.

Cr. Code sec. 1124, which gives power to the court on certiorari to peruse the depositions in order to ascertain if an offence of the nature described in the conviction attacked has been committed, conclusively shews that the depositions in a summary conviction matter form a part of the record and that the court on certiorari may read the depositions with the view of ascertaining if there is evidence to support the conviction and, if there is none, the conviction may be quashed. [R. v. Emery, 27 Can. Cr. Cas. 116, 33 D.L.R. 556, 10 A.L.R. 139, approved; see R. v. Barb (1917), 28 Can. Cr. Cas. 93, 35 D.L.R. 102.]

Lacasse v. Fortier (Que.), 30 Can. Cr. Cas. 87.

Depositions wrongly admitted — Magistrate's certificate.

Where the magistrate wrongly admitted in evidence the depositions of a witness in another case, the court on certiorari may

conclude that he was influenced by such depositions and quash the conviction on that ground notwithstanding the certificate of the magistrate that he was not so influenced. [R. v. Melvin (1916), 27 Can. Cr. Cas. 350, 34 D.L.R. 382, 38 O.L.R. 231, applied.]

Rex v. Bracci, 29 Can. Cr. Cas. 351, 14 O.W.N. 305.

SUMMARY CONVICTION—EVIDENCE—JURISDICTION.

Evidence by affidavit is admissible on a certiorari motion to quash a summary conviction to prove that the accused did not plead guilty as set forth in the magistrate's record of proceedings; and in like manner affidavits are admissible contra to support the claim that the plea was correctly recorded by the magistrate. If it be found that the magistrate's record of the proceedings was wrong in that respect, the conviction made in his belief that the defendant pleaded guilty must be set aside on certiorari because of lack of jurisdiction to convict without evidence or a plea of guilty. [R. v. Richmond (1917), 29 Can. Cr. Cas. 29, referred to.]

Rex v. Barlow (Alta.), 29 Can. Cr. Cas. 381, [1918] 1 W.W.R. 499.

TO QUASH CONVICTION — INTOXICATING LIQUORS — SECOND OFFENCE — AMENDMENT OF STATUTE—EVIDENCE.

Rex v. Clarke, 41 D.L.R. 713, 13 A.L.R. 468, [1918] 2 W.W.R. 752.

B. EXISTENCE OF OTHER REMEDY.

(§ I B—12)—RIGHT OF APPEAL.

If there is a right of appeal from a summary conviction but it has not been taken advantage of, certiorari will not be granted unless there are exceptional circumstances. [Ex parte Doucet, 24 Can. Cr. Cas. 347, 43 N.B.R. 361, and Ex parte Young, 32 N.B.R. 178, followed.]

Rex v. O'Brien; Rex v. Theriault (N.B.), 41 D.L.R. 97, 29 Can. Cr. Cas. 141.

A conviction for an indictable offence tried by a police magistrate under sec. 777, Pt. XVI., of the Criminal Code, will not be quashed on certiorari, a remedy by way of appeal having been provided by sec. 1013, Pt. XIX., of the Code.

The King v. Limerick, 45 N.B.R. 269.

II. Procedure; hearing; determination.

(§ II—15)—MOTION FOR WRIT OF—POWER OF JUDGE TO MAKE ORDER ABSOLUTE ON FIRST HEARING—NOTICE OF MOTION SIGNED BY SOLICITOR—SUFFICIENCY—RR. 28, 33 CROWN OFFICE RULES.

Rex v. Wong Joe (B.C.), [1918] 3 W.W.R. 581.

(§ II—20)—FILING AMENDED CONVICTION—DEPOSITIONS.

Leave to file an amended conviction on the return of a certiorari motion to quash will be refused where it was essential to the offence under a provincial law that it should have taken place in an electoral district constituting a restricted locality and the description of the place of offence in the first conviction did not shew that it was within the restricted locality, unless the amendment intended to cure the defect is supported by the evidence and proceedings before the magistrate.

Rex v. Bissette (Alta.), 41 D.L.R. 52, (annotated) 29 Can. Cr. Cas. 97.

(§ II—24)—ONUS OF PROOF—WEIGHT OF EVIDENCE.

The court hearing a certiorari motion may quash a summary conviction which a magistrate has entered arbitrarily in reliance upon the shifting of the onus of proof by statute upon the defendant without giving judicial consideration to the question of the credibility to the defendant's evidence contra, but if the statutory onus is that the accused shall prove that he did not keep liquor for sale when a quantity of liquor was found in his possession the magistrate may take into consideration the circumstances under which it was found and under which it was obtained in deciding that he will not accept the defendant's denial on oath that it was kept for purpose of sale. [Rex v. Covert, 28 Can. Cr. Cas. 25, 34 D.L.R. 662, 10 A.L.R. 349, commented upon.]

Rex v. Morin, 38 D.L.R. 617, 28 Can. Cr. Cas. 414, 12 A.L.R. 101.

REVIEW OF CONVICTION UNDER MUNICIPAL BY-LAW.

On a certiorari application in respect of a summary conviction under a municipal by-law, the court may look at the depositions and proceedings before the magistrate to see if the by-law has been proved, and, if not, may quash the conviction. [R. v. Banks, 1 Can. Cr. Cas. 370, 2 Terr. L.R. 81, followed.]

City of Lethbridge v. Hanson (Alta.), 29 Can. Cr. Cas. 43.

(§ II—35)—RETURNING AMENDED CONVICTION—COPY.

A statute requiring the magistrate to file a "copy" of each conviction under a particular statute in a public office within a limited time will not debar the magistrate from amending the original conviction while still in his possession in a manner conformable to the actual adjudication and filing a copy of such amended conviction so as to cure an omission in the first copy filed of the time when the offence was committed as proved by the evidence, and such amended conviction may be returned to an order for certiorari granted after the filing of a copy of the first pursuant to the statutory requirement. [R. v. Learmont, 23 N.S.R. 24, distinguished; R. v. McAnn, 3 Can. Cr. Cas. 110, referred to.]

Rex v. Shatford, 38 D.L.R. 366, 51 N.S.R. 322, 28 Can. Cr. Cas. 284.

(§ II—36)—Summary convictions—Appeal.

A summary conviction is to be considered as "removed by certiorari" for the purposes of Code sec. 1124, and its curative provisions as regards convictions otherwise irregular but founded on evidence satisfactorily disclosing an offence of the nature described in the conviction, although the conviction itself had not in fact been brought up under a writ of certiorari but on a motion to quash the conviction under a method of procedure authorized by Rules of Court passed under Code sec. 576. It is sufficient in such case that the conviction and papers pertaining to it were certified and returned to the superior court on notice, instead of by a return to a writ of certiorari, and that for the purposes of an appeal from an order refusing to quash, the appellate court has before it the conviction and papers so returned by the magistrate and certified to the Appellate Division by the proper officer of the division in which the order appealed from was made. (Per Meredith, C.J.C.P.). [R. v. Titchmarsh (1914), 32 O.L.R. 569, applied; Ont. Practice Rule 1287, considered.]

Rex v. Jackson, 29 Can. Cr. Cas. 352, 40 O.L.R. 173, 12 O.W.N. 315, affirming, 12 O.W.N. 191. [See 12 O.W.N. 77, 161.]

CHARITIES.

As to charitable bequests, see Wills, III.

CHATTEL MORTGAGE.

I. In general.
II. Validity; consideration.
A. Generally.
B. Description of property.
C. Property subject to mortgage; after-acquired property.
D. Possession; power to sell.
III. Filing; recording; renewing.
IV. Effect; rights of parties; priorities.
A. In general.
B. Priorities.
V. Assignment; satisfaction; abandonment; waiver.
VI. Enforcement.

Annotations.

Equity; agreement to mortgage after-acquired property; beneficial interest: 13 D.L.R. 178.

Registrability of hiring lease or conditional sale: 32 D.L.R. 566.

I. In general.

See previous Annual Digest.

II. Validity; consideration.

A. Generally.

(§ II A—5)—Action by judgment creditors to set aside—Bills of Sale and Chattel Mortgage Act—Judgment satisfied—Costs—Other creditors.

The plaintiffs, being judgment creditors of the defendant company by virtue of a judgment recovered in a Division Court, brought this action, in the Supreme Court of Ontario, to have it declared that a certain chattel mortgage made by the defendant company to the defendant T. was void as against the plaintiffs and other creditors of the defendant company. When the action was commenced, execution had not been issued upon the plaintiffs' judgment. Before this action came down to trial, the amount of the plaintiffs' judgment had been paid to them; and, so far as they were concerned, only the costs of this action were in question. The trial Judge (Latchford, J.) determined that the chattel mortgage was void against creditors of the mortgagor, and ordered the defendants to pay the plaintiffs' costs of the action. The defendants appealed from this judgment:—Held, that the chattel mortgage was rightly found to be void under the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, ch. 135—the transaction between the defendants was in fact an endorsement by the defendant T. of the defendant company's promissory note, whereas the chattel mortgage was in the form prescribed for a direct loan. Held, also, that the trial Judge's award of costs to the plaintiffs could not be interfered with, but that the plaintiffs should have no costs of the appeal. Per Meredith, C.J.C.P.:—After this action was brought, the plaintiffs' claim was not for the amount owing upon their judgment only, but for the costs of this action also. The costs did not become a debt until adjudged to the plaintiffs; but, when adjudged, an invalid mortgage should not be allowed to stand in the way of enforcing payment of them. The plaintiffs should have issued execution in the Division Court, caused the mortgaged goods to be seized under their execution, and, if a claim had been then made by the mortgagee, litigated that claim in the Division Court in interpleader proceedings. Having taken a more expensive course, they should be deprived of the costs of the appeal. Per Riddell and Rose, JJ.:—Although it was not shewn by the style of cause, as it should have been, it sufficiently appeared from the statement of claim, that this action was brought on behalf of all creditors, and on amendment of the style of cause was properly allowed at the trial. The defect in the chattel mortgage was one of which advantage could be taken by creditors. If the plaintiffs had not sued on behalf of all creditors, not being execution creditors when they commenced this action, they would have had no locus standi; but, suing as they did on behalf of all creditors, their status was expressly established by sec. 2 (b) of the Bills of Sale and Chattel Mortgage Act. And they had proved that there were other creditors.

Barchard & Co. v. Nipissing Coca Cola Bottle Works, 42 O.L.R. 196.

B. Description of property.

(§ II B—10)—General words—Pulpwood.

The words "all the pulpwood belonging to the undersigned wherever situate" are too

general to be effective in an assignment to a bank as security on goods.

Battle Island Paper Co. v. Molsons Bank, 38 D.L.R. 372, 27 Que. K.B. 28.

GRAY MARE AND NATURAL INCREASE OF ANIMAL.

Clements v. National Manufacturing Co., 38 D.L.R. 751, 10 S.L.R. 438, [1918] 1 W.W.R. 23.

III. Filing; recording; renewing.

(§ III—38)—REGISTRATION — EXTENSION OF TIME—JURISDICTION—BILLS OF SALE ACT.

The expression "any Judge of the Supreme Court" in sec. 21, Bills of Sale Act, R.S.B.C. 1911, ch. 20, as amended by sec. 2, ch. 5, 1914 (B.C.), constitutes a Judge of the Supreme Court persona designata, under that Act, and a County Court Judge, although acting as a local Judge of the Supreme Court, has no jurisdiction to make an order extending the time for registration of a chattel mortgage.

Re Winding-Up Act and Austin Hotel Co. (B.C.), [1918] 1 W.W.R. 794.

IV. Effect; rights of parties; priorities.

B. PRIORITIES.

(§ IV B—45)—CROPS—EXECUTION.

Section 17 of the Chattel Mortgage Act, R.S.S. 1909, ch. 144, as amended by 1916 stats., ch. 37, sec. 22, authorizes a chattel mortgage to be given on growing crops to secure the purchase price of food and supplies; but such mortgage does not take priority over a prior execution.

De Laval Dairy Supply Co. v. Nichol, 42 D.L.R. 713, 11 S.L.R. 295, [1918] 2 W.W.R. 1017.

POSSESSION UNDER DEFECTIVE MORTGAGE.

Possession taken by a mortgagee, under a defective chattel mortgage, in that it did not comply with the requirements of the Bills of Sale Ordinance (C.O. 1898, ch. 43, sec. 17, Alta.), saves the mortgagee's rights as against all persons who are not at the time of the taking of the possession either execution or attaching creditors or purchasers or mortgagees for value. [See annotation 32 D.L.R. 566.]

Security Trust Co. v. Stewart, 39 D.L.R. 518, 12 A.L.R. 420, [1918] 1 W.W.R. 709, reversing 39 D.L.R. 801, 12 A.L.R. 420.

V. Assignment; satisfaction; abandonment; waiver.

(See previous Annual Digest.)

VI. Enforcement.

(See previous Annual Digests.)

CHEQUES.

See Bills and Notes; Banks.

Alteration affecting validity, see Alteration of Instruments.

Annotation.

Delay in presenting for payment: 40 D.L.R. 244.

(§ IV—22)—AUTHORITY TO ENDORSE—RESTRICTED — BONÂ FIDE HOLDERS — RIGHTS OF PARTIES.

Canadian Bank of Commerce v. Won Foo, 42 D.L.R. 768, 13 A.L.R. 546, [1918] 3 W.W.R. 212.

CHILDREN.

See Parent and Child; Infants.

As beneficiaries, see Wills.

CHOSE IN ACTION.

See Assignment.

Annotation.

Definition; primary and secondary meaning in law: 10 D.L.R. 277.

CHURCHES.

See Religious Institutions; Charities; Benevolent Societies.

Gifts to, see Wills, III.

CITIES.

See Municipal Corporations; Towns.

CIVIL RIGHTS.

See Constitutional Law; Aliens.

Annotation.

Status of alien enemies during war: 23 D.L.R. 375.

CLAIMS.

In winding-up proceedings, see Companies; Assignments for Creditors.

Against decedent's estate, see Executors and Administrators.

In expropriation matters, see Expropriation; Damages, III L.

Against municipalities, see Municipal Corporations.

Land claims, see Public Lands.

Mining claims, see Mines and Minerals.

CLOUD ON TITLE.

See Land Titles; Ejectment; Vendor and Purchaser.

CLUBS.

See Associations; Benevolent Societies.

EXPULSION OF MEMBER FOR POLITICAL OPINIONS—FREEDOM OF SPEECH—INJUNCTION.

A resolution, adopted by a social club for the purpose of expelling one of its members, on account of words spoken by him in the exercise of his duties as a member of the legislative assembly, constitutes a violation of the parliamentary immunity of the freedom of speech, and is, in such respect, illegal and void (Cross, J., dissenting). When club by-laws provide for the constitution of a committee before acting as a special tribunal for the expulsion of members, such tribunal alone has jurisdiction in the matter, and the method of expulsion set out in the by-laws must be strictly followed.

Any concerted action by other members of the club than those of the committee regularly convened is illegal, improper and void.

Le Club de la Garnison de Quebec v. Lavergne, 27 Que. K.B. 37.

ASSOCIATION OF HOCKEY CLUBS—CENTRAL ASSOCIATION — INTERFERENCE WITH PLAYERS OF ONE CLUB — ACQUIESCENCE —LEAVING CLUB OUT OF SCHEDULE OF MATCHES — POWERS OF ASSOCIATION — EVIDENCE—INJUNCTION.

Toronto Hockey Club v. Ottawa Hockey Association, 15 O.W.N. 145.

CODICIL.

See Wills.

COLLISION.

Between automobiles, see Automobiles.

On highways or railways, see Railways; Carriers; Street Railways; Negligence.

Between vessels, see Shipping; Admiralty.

Annotations.

Shipping: 11 D.L.R. 95.

Collisions on high seas; limitation of jurisdiction: 34 D.L.R. 8.

(§ I—3)—OPEN SEA—RULES OF NAVIGATION —NEGLIGENCE.

The rules of navigation governing the open sea apply to open water of the St. Lawrence river; it is negligent for a ship approaching another in a fog to alter her course and fail to reverse engines, in violation of rules 16, 21, and 29, where the other vessel has obeyed rule 23. [See also C.P.R. Co. v. S.S. "Storstad," 34 D.L.R. 1 (annotated).]

Canadian Pacific R. Co. v. S.S. "Storstad," 40 D.L.R. 600, 17 Can. Ex. 160.

CANAL—RULES AND REGULATIONS.

The only exception to a rigid compliance with the regulations prescribed for the navigation of Canadian waters and canals is when it appears with perfect clearness, amounting almost to a certainty, that adhering to the rule would have caused a collision and violating the rule would have avoided it. The Rules of the Department of Railways and Canals, except where they indicate the contrary, govern vessels using the canals, and are not intended merely for the preservation and safety of the canals.

Canadian Sand and Gravel Co. v. The "Keywest," 38 D.L.R. 682, 16 Can. Ex. 294.

FOG—RULE OF ROAD—SPEED—LOOK-OUT.

Where in a fog or thick weather a steamer proceeds at an excessive speed, without a sufficient look-out, and fails to keep out of the way of a schooner keeping properly within her course, she is in violation of arts. 16 and 20 of the Rules of the Road, and liable for a collision with the latter vessel.

Smith v. Mackenzie, 41 D.L.R. 393, 17 Can. Ex. 493.

FOG—DUTY AS TO SPEED—LIABILITY—COSTS.

The provisions of art. 16, requiring each vessel in case of fog or thick weather to "stop her engines and then navigate with caution," must be strictly adhered to in order to avert a collision. Mere sounding of the fog signal is not sufficient. Where both vessels are at fault "the damages shall be borne equally by the two vessels," pursuant to sec. 918 of the Canada Shipping Act (R.S.C. 1906, ch. 113). The old rule that each delinquent vessel shall bear her own costs is still in force.

Pallen v. The "Iroquois," 17 Can. Ex. 185, 11 D.L.R. 41, 18 B.C.R. 76.

OVERTAKING VESSEL — FOG SIGNALS — FAUTE COMMUNE—DAMAGES.

A steamer descending the St. Lawrence River in foggy weather had come to anchor for safety. Previous to anchoring the ship was being overtaken by another ship descending the river. Both ships had failed to give the proper fog signals, and as a result the steamer at anchor was run down by the other. Held, as the ships were both at fault the damages should be divided. Status of report of the Commission of Wrecks before the Court commented on.

Crown Steamship Co. v. The "Lady of Gaspé"; Bouchard v. "Crown of Cordova," 17 Can. Ex. 191.

TUG AND TOW—BARGE.

Held, that upon the evidence the judgment of the Court below was correct in finding a tug, having a dead tow, responsible for a collision with a barge properly moored.

The "Ethel Q" v. Beaudette, 17 Can. Ex. 505.

COMMERCE.

Annotations.

Effect of war on commerce with alien enemy: 22 D.L.R. 865, 23 D.L.R. 375.

COMMISSIONERS.

Railway commissioners, see Carriers; Railway Board.

School Commissioners, see Schools.

COMMISSIONS.

Of agents, brokers, see Brokers; Principal and Agent.

Of administrator, see Executors and Administrators.

Commission to take evidence, see Discovery; Depositions.

COMPANIES.

I. NATURE; CREATION; FRANCHISES; GOVERNMENTAL REGULATION.
- A. In general.
- B. Corporate purposes.
- C. De facto corporation.
- D. Names.
- E. Governmental regulation.

II. CONSOLIDATION; REORGANIZATION; TRANSFER OF FRANCHISES.

III. CHARTERS; ARTICLES OF INCORPORATION.

IV. Powers, liabilities and officers.
A. Rights and powers generally.
B. Owning stock of other companies.
C. Mode of corporate action; acts of agents.
D. Contracts; ultra vires.
E. Property rights.
F. Liabilities.
G. Officers; meetings.
H. Promoters.
V. Capital; stock and stockholders.
A. In general; issue of stock.
B. Subscriptions.
C. Transfers; lien.
D. Forged or fraudulent issue.
E. Rights of shareholders.
F. Liability of shareholders; contributories.
G. Stockholders' meetings; voting.
VI. Dissolution; forfeiture; insolvency; winding-up.
A. In general.
B. Grounds of forfeiture.
C. Effect on property rights.
D. Effect on causes of action.
E. Procedure; power of liquidator.
F. Insolvency; right and preferences of creditors.
VII. Foreign corporations; extra-provincial corporations.
A. In general.
B. Doing business within province.
C. Actions by or against.
D. Winding-up; insolvency of foreign corporation.
VIII. Crimes and offences by corporation.

As to public service corporations, see Municipal Corporations; Railways; Street Railways; Carriers.
Receivers for, see Receivers.
Taxation of, see Taxes.
Banking, see Banks.
Insurance companies, see Insurance.

Annotations.

Directors contracting with a joint-stock company: 7 D.L.R. 111.
Franchises; federal and provincial rights to issue: B.N.A. Act: 18 D.L.R. 364.
Powers and duties of auditor: 6 D.L.R. 522.
Receivers; when appointed: 18 D.L.R. 5.
Debentures and specific performance: 24 D.L.R. 373.
Share subscription obtained by fraud or misrepresentation: 21 D.L.R. 103.
Effect of war on enemy corporations and firms: 23 D.L.R. 375, 378.
Powers of Dominion and Provinces to incorporate companies: 26 D.L.R. 294.
Ultra vires as defence in actions on corporate contracts; estoppel: 36 D.L.R. 107.

I. Nature; creation; franchises; governmental regulations.

A. In general.

Provincial powers as to incorporation of companies, see Constitutional Law.

D. Names.

(§ I D—15)—New corporation—Similarity of names—Injunction.

An injunction will be granted to restrain a proposed new company from applying for registration where the circumstances point to an intention on the part of the new company to do business under a name which might easily be mistaken for the name of an existing company, doing the same class of business, and thereby deceive the public. It is not necessary to wait until the company actually commences to do such business. [Hendricks v. Montagu (1881), 17 Ch. D. 638, referred to.]

Guardian Assurance Co. v. Garrett (B.C.), 40 D.L.R. 455, [1918] 2 W.W.R. 405. [Reversed by Supreme Court of Canada.]

II. Consolidation; reorganization; transfer of franchises.

(See previous Annual Digests.)

III. Charters; articles of incorporation.

(§ III—30)—Saskatchewan company doing business in Ontario—Incorporation by memorandum of association under Saskatchewan Companies Act—Extra Provincial Corporations Act, R.S.O.1914, ch. 179, sec. 16 (2)—Sale of Saskatchewan lands—Contract made in Ontario in 1912—License obtained by company in 1918—Comity—Effect of license—Company not incorporated by sovereign authority—Powers of company created by Memorandum of Association—Amendment to Saskatchewan Companies Act by 7 Geo. V., ch. 34, sec. 13a—Acts done before amendment—Ultra vires as against citizen of Ontario—Action to enforce contract—Defence of misrepresentation—Failure on evidence.

Weyburn Townsite Co. v. Honsburger, 15 O.W.N. 49, 43 O.L.R. 451, reversed 15 O.W.N. 428.

IV. Powers, liabilities and officers.

A. Rights and powers generally.

(§ IV A—40)—Directors — Salaries — Rights of minority — Contract — Fraud—Return of sums paid.

The capital stock of a contracting company was $200,000, divided into 2,000 shares; the plaintiff owned 500 shares, the defendants H. and D. each 500 shares, and the third defendant and his wife 500 shares between them; and the plaintiff and defendants were the directors. The active management of the affairs of the company, the procuring of railway construction contracts and the carrying out of the work thereunder, was in the hands of the defendants H. and D.; and large profits accrued from the operations of the company, begun in 1905. In 1909, the defendants H. and D. became dissatisfied, and informed the plaintiff of their complaint, viz., that, while they did all the work and earned all the profits, the profits were shared

by the plaintiff. At a meeting of the directors, early in January, 1910, at which the plaintiff was present, "it was decided," as the minutes read, "that the officers actively engaged in the management of the company should receive a salary to be settled on hereafter, this salary to date from May 1st, 1909." Nothing was done (at any rate for some years) in pursuance of this decision; the work went on as before until, in July or August, 1911, the defendants H. and D. determined to take such future contracts as they could obtain for their own benefit and not for the company. This determination was not announced to the plaintiff; but, in December, 1911, H. and D. intimated to the plaintiff that there must be a severance; and, in March or April, 1912, the L.S. contract was taken by H. and D. for themselves only; and they then notified the plaintiff of their intention to take all future contracts in their own names and for their own benefit. In Cook v. Deeks,]1916] 1 A.C. 554, 27 D.L.R. 1, it was declared by the Judicial Committee of the Privy Council, on the 29th February, 1916, that H. and D. were trustees for the company of the profits obtained from the L.S. contract. On the 25th March, 1916, a by-law was passed by the directors of the company (in the face of the opposition of the plaintiff) authorising the payment out of the funds of the company of salaries to H. and D., at the rate of $25,000 a year each, for the period commencing on the 1st May, 1909, and ending on the 23rd February, 1912; this by-law was confirmed at a shareholders' meeting held on the 10th April, 1916, all the shareholders, except the plaintiff, being present; and the sum of $70,461.43 was paid to H. and a like sum to D.:—Held, that the by-law was ineffective, and the amounts paid to H. and D. should be repaid to the company. Judgment of Masten, J., reversed.

Cook v. Hinds, 44 D.L.R. 586, 42 O.L.R. 273. [See 33 O.L.R. 209, 21 D.L.R. 497, [1916] 1 A.C. 554, 27 D.L.R. 1.]

EXTRA-PROVINCIAL POWERS — MEETINGS OUTSIDE PROVINCE—CARRYING ON BUSINESS — RESOLUTIONS — VALIDITY — LIABILITY OF SHAREHOLDER—CONTRIBUTORIES—ESTOPPEL.

A company incorporated under the Companies Act, R.S.B.C. 1911, ch. 39, and the Memorandum of Association, of which gives it power "to do any or all of the above things in any part of the world," has the capacity analogous to that of a natural person, to exercise extra-provincial powers [Bonanza Creek case, [1916] 1 A.C. 566, 26 D.L.R. 273, discussed]. Sec. 72 (3) of the Companies Act, R.S.B.C. 1911, ch. 39, which declares that "every general meeting of the company shall be held within the province," applies only to annual general meetings, and does not prohibit the holding of other meetings outside the province. A shareholder held to be estopped from disputing his liability to be placed on the list of contributories of the above-named company. Quære, whether the holding of shareholders and directors' meetings is a carrying on of business. Certain resolutions of a company held to have been regularly passed under the company's Memorandum and Articles of Association and Act of Incorporation and shares issued in pursuance of such resolutions held to have been validly issued.

Re Lands & Homes of Canada (Robertson's case) (Man.), [1918] 3 W.W.R. 935, 44 D.L.R. 325.

POWERS OF MANUFACTURING COMPANY INCORPORATED BY DOMINION AUTHORITY—GUARANTY OF INDEBTEDNESS OF ANOTHER COMPANY TO BANK—SPECIAL CLAUSE IN CHARTER—BENEFIT OF COMPANY—BUSINESS CONDUCTED FOR SUCH BENEFIT—DIRECTORS ACTING THROUGH OFFICERS—POWER TO AFFIX SEAL—CONTRACT BINDING ON COMPANY—CONTINUING GUARANTY—AMENDMENT.

Bank of Ottawa v. Hamilton Stove and Heater Co., 15 O.W.N. 152.

C. MODE OF CORPORATE ACTION; ACTS OF AGENTS.

(§ IV C—55)—REGISTRATION OF "MORTGAGE OR CHARGE."

An assignment of an unascertained amount, to be credited to the assignor when collected, as security for a debt, is a "mortgage or charge," within the meaning of sec. 102, ch. 39, R.S.B.C. 1911, though absolute in form, and is not valid as against the liquidator of the assignor if not registered before his appointment.

Dominion Creosoting Co. v. Nickson Co., 38 D.L.R. 69, 55 Can. S.C.R. 303, [1917] 2 W.W.R. 330, affirming, 35 D.L.R. 272, 23 B.C.R. 72. [Leave to appeal to Privy Council refused.]

It is only purchasers, mortgagees or creditors in relation to the mortgagor who are entitled to the benefit of sec. 102 of the Companies Act, R.S.B.C. 1911, ch. 39, requiring mortgages or charges created by a company to be filed with the registrar of joint stock companies.

Dalton v. Dominion Trust Co. (B.C.) [1918] 3 W.W.R. 42.

D. CONTRACTS; ULTRA VIRES.

(§ IV D—60)—CHARTER—RIGHTS AT COMMON LAW—FORFEITURE OF CHARTER.

The Ontario Companies Amendment Act (1916), 6 Geo. V., ch. 35, sec. 6), expressly declares that "every corporation or company . . . heretofore or hereafter created by or under any general or special Act . . . shall, unless otherwise expressly declared in the Act or instrument creating it, have and be deemed from its creation to have had, the general capacity which the common law ordinarily attaches to corporations created by charter." A corporation created by charter had at common law almost unlimited capacity to contract, to bind itself by contracts, to deal with its property and to do all such acts as a private person could do.

Statements in the charter defining the objects of the incorporation do not take away that unlimited capacity, and even express restrictions in the charter do not take it away, but are simply treated as a declaration of the Crown's pleasure, in reference to the purposes beyond which the capacity of the corporation is not to be exercised, a breach of which declaration gives to the Crown a right to annul the charter. [British South Africa Co. v. DeBeers Consolidated Mines Limited, [1910] 1 Ch. 354; Diebel v. Stratford Improvement Co., 37 O.L.R. 497; National Malleable Castings Co. v. Smith's Falls Malleable Castings Co. (1907), 14 O.L.R. 22; Biggerstaff v. Rowatts Wharf Limited, [1896] 2 Ch. 93; County of Gloucester Bank v. Rudry Merthyr Steam and House Coal Colliery Co., [1895] 1 Ch. 629; John Deere Plow Co. v. Wharton, 18 D.L.R. 353, referred to; Bonanza Creek Gold Mining Co. v. The King, 26 D.L.R. 273, distinguished; Att'y-Gen'l for Canada v. Att'y-Gen'l for Alberta, 26 D.L.R. 288; Union Bank v. McKillop, 24 D.L.R. 787, referred to. See annotations, 18 D.L.R. 364, 26 D.L.R. 295, 36 D.L.R. 107.]

Edwards v. Blackmore, 42 D.L.R. 280, 42 O.L.R. 105.

CONTRACT OF EMPLOYMENT—IRREGULAR RESOLUTION—SALARY—SHARES—DAMAGES.

A contract for the employment of a manager, signed by the president and secretary of a company under a resolution of the board of directors, cannot be repudiated by the latter, after it has admitted its fulfilment, on the ground that it was irregularly passed. Such contract, stipulating a salary $2,500 a year, payable $125 per month in money and $83.33 a month in shares, which he was to subscribe for, is only a contract of service at a salary of $125 a month. As a subscriber for the shares, he is not bound to make a formal demand for delivery of his paid-up shares, and if the company refuses to issue them to him, or to recognise him as a shareholder, he has the right to seek damages for the non-fulfilment of his obligation. The damages he is entitled to in such case is the value of the shares.

Schneider v. La Compagnie de Sable et de Brique des Laurentides, 54 Que. S.C. 4.

(§ IV D—80)—DOMINION COMPANY—BOND—ULTRA VIRES AS DEFENCE.

A trust company incorporated by Dominion authority having applied for and obtained registry under the Ontario Act, and as a term of receiving its license having given a bond to the Attorney-General for Ontario for the due performance of the duties of any office to which it might be appointed, cannot, nor can its sureties, in an action on the bond—after the winding-up of the company—for balances improperly advanced, set up that the provisions of the Act under which the bond was demanded and given were ultra vires the province so far as it was sought to apply them to a Dominion company.

Att'y.-Gen'l. for Ontario v. Railway Passengers Ass'ce. Co., 43 D.L.R. 344, 43 O.L.R. 108, reversing, in part, 41 O.L.R. 234. [See also John Deere Plow Co. v. Wharton (annotated), 18 D.L.R. 353, [1915] A.C. 330.]

E. PROPERTY RIGHTS.

(§ IV E—96)—AGREEMENT OF SALE.

A company incorporated by Act of Dominion Parliament having obtained an indefeasible title to real property of a greater value, and for other purposes than authorised by the incorporating Act, may properly enter into an agreement for sale of the said property and recover arrears due under such agreement.

Hudson Bay Ins. Co. v. Creelman (B.C.), 40 D.L.R. 274, 25 B.C.R. 307, [1918] 2 W.W.R. 448, reversing, 37 D.L.R. 199.

G. OFFICERS; MEETINGS.

(§ IV G—105)—DISMISSAL OF OFFICERS—POWERS.

Held, the power of the defendants as a legally constituted association to remove their secretary-treasurer, whom they had elected to office, is a power which is inherent to such association, at common law, provided such removal be for cause affecting the plaintiff's fitness and capacity for office; that this power was justly exercised.

Poliquin v. Longshoremen's Union, 24 Rev. de Jur. 573, 24 Rev. Leg. 504.

(§ IV G—123)—SECRET PROFITS.

Secret profits obtained by those who are in reality trustees of a company, organized and incorporated under the Ontario Companies Act, for the purpose of acquiring and re-selling land, which had been purchased by a syndicate, the members of which became shareholders of the company, are profits of the company, and those who in effect paid it are liable to refund it or cause it to be refunded.

Crawford v. Bathurst Land and Development Co., 43 D.L.R. 98, 42 O.L.R. 256, affirming, 37 O.L.R. 611.

(§ IV G—133)—LIABILITY OF DIRECTORS—DIVIDENDS—PROSPECTUS.

When directors of a company in formation signed and published a prospectus guaranteeing the subscribers of stock a dividend of 30%, secured by a deposit of 10% taken from the payments of the stock, they are in fact declaring a dividend taken out of the capital obtained from the sale of the company's stock, and not earned from the profit. The declaration of dividend is illegal and null. If the company commences its operations before 10% of its authorized capital has been subscribed and paid for, the directors are responsible personally for the losses of the shareholders. Election of directors and officers made before any certificate has been issued and without even the company having a stock book is of no legal effect. A prospectus which announced that the provisional directors have promoted this company for the purpose of taking up certain "contracts which they made for the purchase and

delivery of," without specifying the date of the agreements and the name of the parties to them, and which contained assertions false, susceptible of deceit, is deemed fraudulent on the part of directors who issued such notice. The directors, in acting as aforesaid, are jointly and severally responsible towards a shareholder having acted in good faith, and bound to reimburse him the amount he has paid for his stock. The secretary-treasurer of the company who was not a provisional director, is not liable for the repayment of this money.

Lefebvre v. Prouty, 54 Que. S.C. 490.

(§ IV G—137)—DIRECTOR TRAVELLING SALESMAN—REMUNERATION.

Sec. 92 of the Ontario Companies Act (R.S.O. 1914, ch. 178), which provides that "No by-law for the payment of the president or of any director shall be valid or acted upon unless passed at a general meeting or if passed by the directors until same has been confirmed at a general meeting," does not prohibit a director from receiving reasonable remuneration for acting in another capacity, such as travelling salesman, without a by-law authorizing such payment.

Canada Bonded Att'y. and Legal Directory Limited v. Leonard-Parmiter Ltd., 42 D.L.R. 342, 42 O.L.R. 141, 13 O.W.N. 437, varying, 12 O.W.N. 388.

DIRECTORS—PERSONAL LIABILITY TO "LABORERS, SERVANTS AND APPRENTICES"—COMPANIES ACT, R.S.O. 1914, CH. 178, SEC. 98—ACTRESS EMPLOYED BY THEATRICAL COMPANY.

Ryan v. Wills, 15 O.W.N. 70, 44 D.L.R. 634, 43 O.L.R. 624.

LIABILITY OF DIRECTORS—WAGES—WINDING-UP—EXECUTION.

The recourse granted by art. 6072, R.S.Q., to labourers, clerks and servants of a joint stock company against its directors', jointly and severally, to recover six months' wages, has no criminal character, but rests on a purely civil obligation created by the law and subject to the conditions imposed by it. In order to exercise such recourse against the directors, a workman, who has obtained a judgment against the company, is not bound to obtain by a proces verbal a report that the company has not sufficient assets to satisfy his judgment, if such insufficiency is otherwise shown by an immediate winding-up of the company. A delay of 9 days to execute the judgment obtained against the company does not constitute, on the part of the workman, an act of negligence which the directors may oppose him as means of contesting the action he has taken against them, unless a prejudice is shown. The order of winding-up of an incorporated company does not terminate the powers of its directors, but only suspends the exercise of such powers. The directors lose their capacity as such only at the end of the winding-up.

Dallaire v. Leclerc, 53 Que. S.C. 201, 24 Rev. de Jur. 254.

V. Capital; stock and stockholders.

A. IN GENERAL; ISSUE OF STOCK.

(§ V A—165)—SALE OF SHARES ACT—DEBENTURES—FLOATING CHARGE—CERTIFICATE.

An application for a certificate under the Sale of Shares Act, ch. 15, 1916, allowing the sale of certain debentures issued by a company and secured by a floating charge upon all the assets of the company, excepting uncalled capital stock, refused on the grounds that the security of such stock was not included, and that, as the charge did not fasten on ascertained and specific property, there was nothing to prevent the company from issuing a second series of debentures secured by a legal mortgage upon specific property which would rank in priority to the floating charge, or creating by a trust deed a charge on specific property, or from creating specific mortgages which would rank in priority to the floating charge; [Re London Pressed Hinge Co., [1905] 1 Ch. 576, distinguished on the ground that the debenture therein provided against the granting of prior securities] and because the debenture itself placed no restriction upon the amount of debentures which might ultimately be issued, and the debenture holders had evidently no legal right to prevent future issues.]

Re Sale of Shares Act; United Grain Growers Case (Sask.), [1918] 3 W.W.R. 92.

ONE MAN CORPORATION—SALE OF STOCK—VALIDITY—CREDITORS.

Under English law, as laid down by the Privy Council, a company composed of a single shareholder, the others only sending their names, can legally exist, and a sale made by him personally to such company of his business, in consideration of the grant of the whole capital stock, is legal, if it is not fictitious and fraudulent. The purchase of the capital stock of a company for a fixed price and the payment of the whole price to the vendor, without retaining the amount due to the creditors according to the list attached to the deed of sale, creates a presumption of simulation sufficient, under the circumstances, to throw upon the vendor the obligation of proving that, subsequently at least, other persons became shareholders of the company, and of explaining the understandings which must necessarily have taken place between the company and the vendor's creditors.

Trahan v. Painchaud, 53 Que. S.C. 445.

B. SUBSCRIPTIONS.

(§ V B—175)—SALE OF SHARES—UNDERTAKING TO RESELL OR REPURCHASE—FRAUD — EVIDENCE — DAMAGES — RESCISSION—POWER OF COMPANY — COSTS.

The plaintiffs, two elderly spinsters, paid to the defendants, a company incorporated under the laws of Ontario, and S., who was the president of the company, certain sums of money, upon agreements executed by the company and S. personally, in the following

or similar terms: "In consideration of . . . . $500 received, . . . from Miss M.W. and Miss H.W. . . . by the (company), in full payment of 5 shares of the par value of $500, we hereby guarantee that, at any time after one year from the date hereof, upon receiving 60 days' notice in writing that said Miss M.W. and Miss H.W. . . . wish to dispose of their holdings in our company, we will resell or repurchase said 5 shares of the par value of $500 at par with . . . interest . . ." The plaintiffs became the holders of certificates for the stock of the company. They brought this action against the company and S. alleging fraud, misrepresentation, and other grounds for relief and claiming to recover the moneys they had paid. The writ of summons was specially endorsed; the defendant S. did not appear; and the plaintiffs entered final judgment against him for the sums paid by them and interest. As against the company, the action proceeded to trial, and it was held:—(1) That the plaintiffs could not recover damages for deceit: actual fraud had not been proved; but, if it had been, the plaintiffs, having taken final judgment against S., upon the contracts in respect of the shares, could not both affirm and repudiate them; the judgment against S. could have been only upon the claim upon the contracts; and the question whether a claim for damages for deceit, against several defendants, is merged in a final judgment upon it against one of them, did not arise. (2) That, for the like reasons, the plaintiffs could not succeed upon a claim to set aside the transactions on the ground of actual fraud. (3) That the plaintiffs' claim to set aside the transactions on the ground of misrepresentation without actual fraud failed for want of proof of misrepresentation; and the election of the plaintiffs to affirm and enforce the contracts defeated a claim to set them aside. (4) That the plaintiffs could not enforce against the company the agreements to resell or purchase; for such agreements were ultra vires of the company. [Helwig v. Siemon (1916), 10 O.W.N. 29, followed. Edwards v. Blackmore 42 D.L.R. 280, 42 O.L.R. 105, referred to.] (5) That the plaintiffs could not recover from the company the moneys paid upon the allegation that they were moneys lent to the company. Semble, that, if the plaintiffs had not affirmed the transactions, they would have been entitled to relief upon another ground: the company, if they failed to become bound according to the terms upon which they were to get the money, could not retain it; when an essential part is omitted, there is no contract. [Morris v. Baron & Co., [1918] A.C. 1, followed.] The action as against the company was dismissed, but without costs.

Ward v. Siemon, 43 O.L.R. 113.

WINDING-UP OF BANKING COMPANY — CONTRIBUTORY — SUBSCRIPTION FOR SHARES—FAILURE TO SHEW ACCEPTANCE BY NOTICE OF ALLOTMENT — CONSTRUCTIVE NOTICE — ORAL AGREEMENT —PROMISSORY NOTE.

Re Monarch Bank; Murphy's Case, 14 O.W.N. 294.

SUBSCRIPTION FOR SHARES — CONTRIBUTORY —ALLOTMENT MADE AND NOTIFIED TO SUBSCRIBER—ATTEMPT TO SHEW, AFTER WINDING-UP ORDER, THAT SUBSCRIPTION MADE UPON CONDITIONS NOT FULFILLED —ORAL VARIATION OF WRITTEN APPLICATION—MISTAKE OR MISREPRESENTATION.

Re Monarch Bank; Simon's Case, 14 O.W.N. 295.

(§ V B—176)—WHEN BINDING—ALLOTMENT OF SHARES.

A promissory note given for shares in a company not yet incorporated is an offer to take shares when the company becomes incorporated; to constitute a binding contract there must be an acceptance of this offer by an allotment of the shares applied for and a notice to the applicant of such allotment.

Morse Co-operative Supply Co. v. Coates (Sask.), 38 D.L.R. 92.

(§ V B—178)—RESCISSION—CONDITION.

One who subscribes and pays for shares in a company on the express condition that certain buildings will be erected and business carried on, is entitled to a refund of the money paid if the conditions are not fulfilled.

Christie v. Alberta Rolling Mills Co., 38 D.L.R. 488, 12 A.L.R. 445, [1918] 1 W.W.R. 98. [Reversed by Supreme Court of Canada.]

(§ V B—180)—PAYMENT BY DIVIDENDS—EFFECT ON WINDING-UP.

A stipulation in a subscription for shares in a company that the amount unpaid thereon is to be paid by the application of dividends is of no avail as against the liquidator. [Re Standard Fire Ins. Co., 12 Can. S.C.R. 644, followed.]

Re Investors (Ball's case) (Man.), [1918] 3 W.W.R. 180.

C. TRANSFERS; LIEN.

(§ V C—185)—TRANSFER — VETO — ULTRA VIRES.

A company constituted under a special Act incorporating Part II. of the Companies Act (ch. 79, R.S.C. 1906), has no power to make a by-law restricting or empowering its directors to veto the transfer of its shares; a by-law providing that transfers shall be subject to the approval of the directors means that they are to be satisfied as to matters within their power upon which they have to exercise a judgment. [See annotation, 36 D.L.R. 107.]

Canada National Fire Ins. Co. v. Hutchings; Great West Permanent Loan Co. v. Hutchings, 39 D.L.R. 401, [1918] A.C. 451, 118 L.T. 484, [1918] 3 W.W.R. 154, affirming 33 D.L.R. 752, 27 Man. L.R. 496.

(§ V C—189)—Shares held in family—Trust—Representations to bank.

Pope v. The Royal Bank, 39 D.L.R. 757, 55 Can. S.C.R. 622, [1918] 1 W.W.R. 38, affirming 11 A.L.R. 68.

Transfer—Trust.

The endorsement by a holder of shares in an incorporated company, of his certificate in favour of himself in trust for a third person, and the delivery to such third person of the certificate so endorsed, does not constitute a valid gift of the shares.

H. Corby Distillery Co. v. O'Meara, 20 Que. P.R. 101.

E. Rights of shareholders.

(§ V E—217)—Resolution ratifying payment of commissioners.

A resolution of a company passed at a meeting of shareholders purporting to ratify the payment of commissioners illegally paid to directors of the company cannot be enforced against the will of any shareholder.

Crawford v. Bathurst Land and Development Co., 43 D.L.R. 98, 42 O.L.R. 256, affirming 37 O.L.R. 611.

(§ V E—220)—Action by one shareholder to set aside transactions between company and principal shareholder—Style of cause — Amendment — Plaintiff suing in representative capacity — Status of plaintiff — Complaint that shares of principal shareholder not paid-up—Agreement made between company and principal shareholder — Improvidence — Consideration — Cheque — Election of directors—Board remaining in office—Loan of money by company to shareholder — Ultra vires—Companies Act, R.S.C. 1906, ch. 79, sec. 29, sub-sec. 2—Ownership of shares—Share-register—Partnership not a separate entity—Restoration of money to company—Notice of meeting of shareholders—Plaintiff represented by proxy—Ratification of agreement—Costs.

Henderson v. Strang, 15 O.W.N. 78.

(§ V E—230)—Dividends.

The declaration of a dividend by a share company is a question of administration and of jurisdiction of the board of administration, unless there was a by-law adopted by the shareholders limiting this power. Shareholders have not the right to intervene in the administration of the affairs of the company, which is, by law, entrusted to the board of administration. A resolution declaring a dividend, adopted by a board of administration, is not a by-law and does not require ratification by the shareholders to become valid. In joint stock companies a by-law differs from a resolution; a by-law, being of a permanent character, governs the affairs of the company until it is repealed. A resolution, on the other hand, is transitory and has for its object only to deal with a particular case. If a dividend is declared by the board of administration, in reduction of capital or from the reserve, the resolution adopted to this end is illegal and renders the directors personally liable.

Denault v. Stewart, 54 Que. S.C. 209.

F. Liability of shareholders; contributories.

(§ V F—253)—Non-allotment—Repudiation.

Persons who apply to a company for shares upon which application no allotment is made, but to whom shares originally issued to others are transferred, are not liable as contributories if they repudiate the shares promptly upon learning the facts.

Western Union Fire Ins. Co. v. Alexander, Loggin and Holmes (B.C.), 39 D.L.R. 632, [1918] 2 W.W.R. 546.

(§ V F—255)—Set off—Unpaid shares—Debt of company to shareholder—Call.

A person liable as a contributory must discharge himself in that character before he can set up that he is entitled to receive something as a creditor of the company. [Re Overend, Gurney & Co., Grissell's case, L.R. 1 Ch. App. 528.] An arrangement between a company and a shareholder therein whereby the latter purports to set off a debt owing to him by the company against the amount unpaid by him on his shares where no call has been made for said amount, is not a ground for removing the shareholder's name from the list of contributories.

Re Consolidated Investments Ltd.; Simons' Case (Alta.), [1918] 2 W.W.R. 581.

(§ V F—259)—Shares forfeited.

Where the power of forfeiting shares has been properly and legally exercised, the person whose shares have been so forfeited ceases to be a member or shareholder of the company and is not liable to be put on the list of contributories on a winding-up under The Winding-up Act, R.S.C. 1906, ch. 144. [Spackman v. Evans, L.R. 3, H.L. 171; Common v. McArthur, 29 Can. S.C.R. 239; Re Wade Co., 2 A.L.R. 171, followed.]

Re Acadia (B.C.), [1918] 3 W.W.R. 477.

Cancelled shares—Validity.

An arrangement between a company and certain of its shareholders whereunder the shares are "cancelled" and the money paid therefor is returned to the shareholders is void, even though the company be solvent at the time, unless the power to purchase its shares has been given to the company by the Act by or under which it was incorporated, and the shareholders whose shares have been so dealt with are liable to be placed on the list of contributories on the winding-up of the company. [Trevor v. Whitworth (1887), 12 App. Cas. 409, followed.]

Re Wallbridge Grain Co. (Alta.), [1918] 2 W.W.R. 886.

(§ V F—262)—Misrepresentation — Estoppel.

Silence for an unreasonable time after notice amounts to acquiescence and laches which will estop a subscriber for shares in a company from attacking his subscription on the ground of fraud or misrepresentation.

Robert v. Montreal Trust Co., 41 D.L.R. 173, 56 Can. S.C.R. 342, affirming 36 D.L.R. 516, 52 Que. S.C. 73.

(§ V F—268)—Infant—Repudiation—Acceptance of dividend.

Where an infant purchases shares in a company he may repudiate the contract upon coming of age, but is bound to do so within a reasonable time, and his acceptance of a dividend after he comes of age is a definite affirmance of the contract. [Birkenhead, etc., R. Co. v. Pilcher, 5 Ex. 121; L. & N.W.R. Co. v. McMichael, 5 Ex. 114, referred to.]

Re Prudential Life Ins. Co.; Re Paterson (Man.), [1918] 1 W.W.R. 105.

G. Stockholders' meetings; voting.

(§ V G—283)—Notice—Waiver.

A general by-law of a company requiring notice to be given of any special meeting cannot be arbitrarily revoked by the directors, at a directors' meeting, signing and approving of a waiver of notice, and the proceedings at a meeting held without such notice having been given will be set aside.

Canada Furniture Co. v. Banning (Man.), 39 D.L.R. 313, [1918] 1 W.W.R. 31.

VI. Dissolution; forfeiture; insolvency; winding-up.

A. In general.

(§ VI A—305)—Technical insolvency—Brewing company.

An order winding-up a brewing company refused and the hearing of the petition enlarged, notwithstanding the fact that the petitioner showed the company's technical insolvency by proving that it had permitted a writ of execution under which its goods were levied upon to remain unsatisfied for fifteen days after seizure, there being no suggestion of any unpaid capital and no evidence of the assets of the company other than its plant and stock in trade.

Re Edmonton Brewing & Malting Co. (Alta.), [1918] 2 W.W.R. 350.

Non-commercial company.

The Winding-up Act does not apply to a company which is not incorporated for a commercial purpose.

Durocher v. Le Club Champetre Canadien Ltd., 19 Que. P.R. 178.

The Winding-up Act applies only to the winding-up of provincial companies incorporated for commercial purposes. A company having only an accessory and potential power to do certain commercial acts is not a commercial company.

Langevin v. Stadium Co., 19 Que. P.R. 245.

Striking off roll—Shareholder sole creditor—Assets acquired by shareholder—Accounting.

Where a company has been struck off the roll by the registrar of companies, the mere fact that some time before the machinery of the registrar's office was set in motion a shareholder wrote him asking that the company be struck off, and stating that the writer held all the stock of the company and there were no liabilities that he knew of except to himself, does not support the contention that the dissolution of the company was brought about fraudulently by such shareholder. The decision in Embree v. Millar (1917), 11 A.L.R. 127, does not apply to a case where before the dissolution of a company its assets were acquired by a shareholder who claims them as his own.

Secord v. Keith (Alta.), [1918] 3 W.W.R. 764.

Action against directors for misfeasance—Appeal — Service ex juris — Amount involved—Future rights.

An appeal from an order refusing to set aside an order for service ex juris in a misfeasance suit brought against directors of a company in liquidation under the Winding-up Act, R.S.C., ch. 144, held not to involve an amount exceeding $500. [Cushing Sulphite-Fibre Co. v. Cushing, 37 Can. S.C.R. 173, followed.] An order granting leave to serve a summons ex juris is not a matter affecting "future rights" within the meaning of sec. 101, of the Winding-up Act, R.S.C., ch. 144, but is a mere matter of practice and procedure.

Brown v. Cadwell (B.C.), [1918] 2 W.W.R. 229.

(§ VI A—311)—Sale of assets—Authorization—Fraud—Unpaid vendor.

An authorization by a Judge to sell the assets of an insolvent company, on certain conditions, may be annulled for fraud and misrepresentations, if it was not disclosed to the Judge that the liquidator had been previously authorized to give, and had given, to the same purchaser, an option on the sale of certain goods forming part of the assets, on other conditions, to protect the interest of an unpaid vendor of the goods. A liquidator duly authorized to give such option, on conditions which guaranteed the unpaid vendor of the goods the payment of the claim, cannot then rescind the contract, if the unpaid vendor has declared his intention of availing himself of it.

Bemier Glass Co. v. Metal Products Co., 24 Rev. Leg. 336.

(§ VI A—313)—Contributories in new company—Agreement — Shares not fully paid—Petition to wind-up.

The petitioner was the holder of shares in the Dominion Trust Company Limited (the old company), and was entitled by agreement between the companies and the Act ratifying same (ch. 89 of B.C. stats., 1913), to exchange them for shares in the Dominion Trust

Company (the new company), a company incorporated by Act of the Dominion Parliament, created to take over the business and assets of the old company. The petitioner had not applied for and had not been allotted shares in the new company in exchange for his shares in the old company, but had been settled on the list of contributories of the new company on the assumption that he had exchanged his shares in the old for shares in the new company. The shares of the petitioner were not fully paid up. The Court held that he had the right under the British Columbia Companies Act, the provisions of which applied to the old company, to petition for the winding-up of the said company on the ground that it was just and equitable to make such order. [Re Dominion Trusts Co. and Allen (1917), 37 D.L.R. 251, referred to.]

Re Dominion Trust Co. and Boyce and Macpherson, 43 D.L.R. 538, [1918] 3 W.W.R. 751, affirming 25 B.C.R. 214, [1918] 1 W.W.R. 648.

INSOLVENCY — WINDING-UP — PETITION BY CREDITOR—OTHERS OPPOSING.

Re Edmonton Brewing & Malting Co. (Alta.), 43 D.L.R. 748, [1918] 3 W.W.R. 988.

C. EFFECT ON PROPERTY RIGHTS.

(§ VI C—330)—BONA VACANTIA — CONSTITUTIONAL LAW.

The right of bona vacantia, in regard to the assets of a defunct English corporation, carrying on business in British Columbia, is vested in the Dominion and does not pass to the province as "revenues" or "royalties" under secs. 102 and 109 of the British North America Act.

The King v. Rithet, 40 D.L.R. 670, 17 Can. Ex. 109.

GOODS IN POSSESSION OF SHERIFF UNDER EXECUTION — PURCHASER — RIGHT OF LIQUIDATOR.

At the time when an order was made, under the Winding-up Act, R.S.C. 1906, ch. 144, for the winding-up of a company, certain goods, which were admittedly at one time the property of the company, were in the custody of the sheriff, in the building occupied by the company, and in which its business had been carried on, under a writ of fi. fa. against the goods and lands of the company. The goods were claimed by the appellants, two men who asserted that they had bought the goods from the company:—Held, that the winding-up order superseded the execution, and that the liquidator should have the custody of the goods, pending an inquiry into the validity of the appellants' claims, and without impairing those claims. [Secs. 33, 84, and 133 of the Act, referred to.]

Re Ideal Foundry and Hardware Co., 42 O.L.R. 411.

MORTGAGE — REGISTRATION — RIGHT OF LIQUIDATOR TO OPPOSE—ESTOPPEL.

An application under sec. 4 of the Companies Amendment Act, ch. 10, 1916, for an order permitting the registration under ch. 39, R.S.B.C. 1911, of a mortgage with the registrar of joint stock companies allowed. [Keyes v. Hanington, 13 D.L.R. 139, distinguished.] A liquidator of a company which is being wound up under order of the Court cannot, by his own actions, prevent the setting-up of a claim to such registration of a mortgage, but the priority given the liquidator by sec. 92 of the Winding-up Act, R.S.C. 1906, ch. 144, is not affected thereby. Generally speaking, the principle of estoppel is not applicable to anything of moment which a liquidator may have said or done, without authority of the Court, in carrying out the liquidation. [Re Ontario Bank; Massey and Lee's case, 8 D.L.R. 243, 27 O.L.R. 192, referred to.]

Re Peoples' Trust Co., [1918] 1 W.W.R. 342, 25 B.C.R. 138.

SALE OF LANDS OF COMPANY—SATISFACTION OF MORTGAGE—CLAIM OF GUARANTORS TO BALANCE OF PROCEEDS OF SALE—AGREEMENT — ACQUIESCENCE — COSTS OF LIQUIDATION PROCEEDINGS — RIGHTS OF LIQUIDATOR.

Re Woodstock Concrete Machinery Co., 14 O.W.N. 323.

D. EFFECT ON CAUSES OF ACTION.

(§ VI D—335)—JUDGMENT AGAINST ESTATE —LEAVE TO ENFORCE.

One who has obtained judgment against the estate in the winding-up of a company has a right to immediate payment, but he must obtain from the Court an order to this effect, and not summon the liquidator under art. 590 C.C.P.

Metro Pictures Ltd. v. McNeil, 20 Que. P.R. 133.

ACTION—LEAVE OF COURT.

In an action brought by leave against a company in liquidation under the Winding-up Act, held, that the plaintiff was entitled to a final order for foreclosure of property mortgaged by the defendant company by way of a trust deed securing a debenture issue.

Michigan Trust Co. v. Canadian Puget Sound Lumber Co (B.C.), [1918] 3 W.W.R. 273.

ACTION—LIQUIDATOR AS PARTY—LIABILITY FOR COSTS.

An action brought in the Supreme Court of Ontario against an incorporated company, to set aside as fraudulent and preferential a chattel mortgage made to the company, was at issue when an order was made by a Quebec Court for the winding-up of the company under the Dominion Winding-up Act, R.S.C. 1906, ch. 144, and a liquidator was appointed. By orders made by the Quebec Court, the liquidator was allowed to intervene and continue the defence of the action, and the plaintiff was allowed to continue the action against the company in liquidation:—Held, that the liquidator of the defendant company was not a necessary or proper party to the action; and an order made by

a Master upon the application of the plaintiff, adding the liquidator as a defendant, was set aside. When a company is in process of being wound up, the liquidator, if unsuccessful in litigation which he is carrying on, will pay the costs out of the assets of the company, and these costs have priority over the liquidator's costs of the winding-up. The estate of the company is in truth the party defendant, and is saddled with the burden of the costs awarded. [Re Pacific Coast Syndicate Limited, [1913] 2 Ch. 26; Re Wenborn & Co., [1905] 1 Ch. 413, followed.] When it is deemed proper that the right of the company should be determined in the pending litigation rather than in the liquidation, the liquidator may sue or defend either in his own name or in the name of the company; if he elects to proceed in his own name, he makes himself personally liable for costs; but no such liability should be imposed upon him, for he is an officer of the Court, and is only discharging his official duty.

Cole v. British-Canadian Fur and Trading Co., 42 O.L.R. 587.

DOMINION COMPANY IN COURSE OF WINDING-UP IN QUEBEC COURT—MECHANIC'S LIEN REGISTERED AGAINST LAND OF COMPANY IN ONTARIO—LEAVE TO COMMENCE ACTION TO ENFORCE—MECHANICS AND WAGE-EARNERS LIEN ACT, R.S.O. 1914, CH. 140—WINDING-UP ACT, R.S.C. 1906, CH. 144, SEC. 22—APPLICATION FOR LEAVE—JURISDICTION—FORUM.

Re Hobbs and Kenabeek Consolidated Silver Mines, 14 O.W.N. 358.

APPEAL — ADJOURNMENT — LIQUIDATOR — JURISDICTION.

Application for an order directing a liquidator to consent to the adjournment of appeals pending before the judicial committee dismissed. Quære, whether once a liquidator has been authorized to take legal proceeding the conduct thereof is not governed by the rules of court procedure with which it is beyond the province of the winding-up Judge to interfere. In interfering with the conduct of the liquidator the Court, even if it has jurisdiction, would be assuming as a general rule, a responsibility which it could not discharge adequately.

Dominion Trust Co. v. New York Life Ins. Co., [1918] 1 W.W.R. 614, 25 B.C.R. 271.

E. PROCEDURE; POWER OF LIQUIDATOR.

(§ VI E—340)—JUDICIAL SALE — AVOIDANCE—SUMMARY PETITION.

The avoidance of a judicial sale of movables made under the Winding-up Act, without fraud being alleged, cannot be pronounced upon summary petition.

Re Royal Agricultural School and Duclos, 20 Que. P.R. 226.

REMOVAL OF LIQUIDATOR—SALARY — DISBURSEMENTS — INSURANCE POLICY — SET-OFF.

A liquidator appointed for an insolvent company cannot, if he has been dismissed for fraud during the winding-up, claim salary for his uncompleted administration. No fee is due to a liquidator for receiving or swearing the claims of creditors. He has no right to engage and pay a special guardian without being authorized by the inspectors and a Judge. Upon his dismissal, he should obtain the cancellation of insurance policies he took out upon the assets, and the repayment of the unexpired premium. If he neglects to do so, he cannot claim this amount from the estate, nor is he entitled to costs of a guarantee policy he was required to furnish for the proper discharge of his duties. A set-off takes place between the legitimate disbursements of a dismissed liquidator and amounts withdrawn by him of which he has not rendered an account.

Re Le Club Athletique Canadien and Finlayson, 20 Que. P.R. 119.

WINDING-UP — LIQUIDATOR — DISBURSEMENTS — PREMIUMS PAID TO GUARANTEE COMPANY FOR FIDELITY BOND.

Re Owen Sound Lumber Co. Limited, 14 O.W.N. 309.

F. RIGHTS AND PREFERENCES OF CREDITORS.

(§ VI F—345)—BANK — SECURITIES — RELEASE OF SURETY.

If a creditor bank elect to take securities at a valuation in payment of a debt of an insolvent corporation, in process of voluntary liquidation, the bank is bound even though there is no statutory provision for such valuation, and a surety for the debtor is released to the extent of that valuation.

Bank of Commerce v. Martin, 40 D.L.R. 155, 24 B.C.R. 381, [1918] 1 W.W.R. 395.

RIGHT OF PETITIONER—SECURED AND UNSECURED CREDITORS.

While a creditor of a company who is unable to secure payment of his debt is, as between himself and the company, entitled ex debito justitiæ to a winding-up order: [Re South East Corp., 23 D.L.R. 724, 8 A.L.R. 460]; yet, as between the petitioner and the other creditors there is no such ex debito right: [Re Crigglestone Coal Co., [1906] 2 Ch. 327, at 331.] A winding-up order refused on the ground that unsecured creditors, other than the petitioner (in this case two-thirds in value of the unsecured creditors) were opposed to the petition.

Re Edmonton Brewing & Malting Co. (No 2) (Alta.), [1918] 3 W.W.R. 988, 43 D.L.R. 748.

WAGES—SOLICITOR'S LIEN.

A liquidator must recognize the status of an insolvent company as it exists at the time its affairs come into his hands. [Re Clinton Thresher Co., 15 O.W.R. 318; Re Fashion Shop Co., 21 D.L.R. 478, 33 O.L.R. 253, followed.] Where a company which has made an assignment under the Assignments Act, ch. 6, 1907, is ordered to be wound up under the Winding-up Act, R.S.C., ch. 144

the priority given by sec. 28 of the Assignments Act to claims for wages over the claims of other creditors is not divested or lost, because of the winding-up proceedings, although the wages in question did not accrue during the three months next previous to the date of the winding-up order. A solicitor cannot acquire as against a liquidator a lien upon the share register and minute book of a company. [Re Capital Fire Ass'ce. Ass'n., 24 Ch.D. 408, followed.]

Re Pioneer Tractor Co. (Alta.), [1918] 1 W.W.R. 329.

DISTRIBUTION — LIABILITY OF LIQUIDATOR.

A liquidator of an incorporated company, who in good faith has distributed and paid to the creditors of the company all the moneys that he has received as liquidator, under an order of the Court, cannot be sued personally for the recovery of any of these sums of money.

Eastern Canada Fisheries v. McIntosh, 27 Que. K.B. 122.

COSTS OF LIQUIDATION—RENT.

In the winding-up of companies under the Winding-up Act (R.S.C., ch. 144, sec. 92), the expenses and costs properly incurred in the winding up, which includes the remuneration of the liquidators, are payable out of the assets of the company in priority to all other claims, and include the claim of the lessor; the rank and privilege of the lessor are governed by the provisions of the said Winding-up Act, and not by those of the Civil Code, when they are in opposition to the costs of liquidation. A voluntary liquidation commences from the date of the resolution ordering it, even when the liquidator is only named later on. A lessor is not a creditor holding security on the estate of the company which he can place a value on, and which he can retain or assign to the estate under secs. 76, 77, R.S.C. ch. 144.

Re Colonial Toy & Show Case and Richards & Organ v. Maurice, 53 Que. S.C. 420.

CLAIM UPON ASSETS BY ASSIGNEE OF CHOSE IN ACTION—JUDGMENT HELD BY COMPANY AGAINST ASSIGNOR OF CLAIMANT—EVIDENCE — SET-OFF — EQUITY — DIVIDEND.

Bailey Cobalt Mines Limited v. Benson, 15 O.W.N. 95.

VII. Foreign or extra-provincial corporations.

B. DOING BUSINESS WITHIN PROVINCE.

§ VII B—374)—ACTS OF GENERAL AGENT.

A foreign company doing business in Canada is bound by the action of its general agent appointed for a province, although the insurance policy contains a clause that "the company is not liable for loss . . . if any subsequent insurance is effected in any other company unless and until the company assents thereto" where such agent, after a fire has occurred, learns of subsequent insurance having been effected, and does not repudiate on account of the condition in the policy, but continues to treat the claim as good and appoints an adjuster with authority to make a settlement with the assured, his action constitutes an assent on behalf of the company.

National Benefit Life and Property Ass'ce. Co. v. McCoy, 42 D.L.R. 21, 57 Can. S.C.R. 29, [1918] 2 W.W.R. 591.

C. ACTIONS BY OR AGAINST.

(§ VII C—375)—NOT LICENSED IN PROVINCE.

Under sec. 168 of the Companies Act (R.S.B.C. 1911, ch. 39) as re-enacted by the Companies Act Amendment Act, 1917 (7 & 8 Geo. V., ch. 10), allowing a company, if it is licensed, to "maintain anew" an action which has been decided against it, on the ground that any transaction of the company was invalid because it was an extra-provincial company and was not licensed; the company is not obliged to bring an action de novo but is entitled to have the action reinstated at the stage at which it was when the judgment based on the statute was given. [John Deere Plow Co. v. Wharton, 18 D.L.R. 353 (annotated), referred to.]

Komnick System Sandstone Brick Mach. Co. v. B.C. Pressed Brick Co., 41 D.L.R. 423, 56 Can. S.C.R. 539, [1918] 2 W.W.R. 564, reversing 8 D.L.R. 859, 17 B.C.R. 454.

D. WINDING-UP; INSOLVENCY OF FOREIGN CORPORATION.

(§ VII D—380)—SUBSTANTIAL INTEREST OF PETITIONER—ONLY CREDITOR.

Where it is not made to appear that a petitioner for a winding up order, under R.S.C. (1906), ch. 144, has a substantial interest in the winding up, and where he is the only creditor desiring an order to wind up, the order ought not to be made. [Re Okell v. Morris (1902), 9 B.C.R. 153, applied.]

Marsden v. Minnekahda Land Co. (B.C.), 40 D.L.R. 76, [1918] 2 W.W.R. 471.

VIII. Crimes and offences by corporation.

(§ VIII—390)—SALE OF SHARES WITHOUT LICENSE OF UTILITY BOARD.

Section 4 of the Sale of Shares Act (Alta. stats. 1916, ch. 8) making it unlawful in Alberta to sell or offer to sell any shares, stocks, bonds . . . of any corporation or company . . . without first obtaining from the Board of Public Utility Commissioners, a certificate . . . and a license . . . applies to agreements to sell as well as completed sales in companies not yet incorporated, and to foreign as well as to domestic companies. A certificate purporting to be given under the authority of a federal order-in-council dated December 22, 1917, giving approval for the issue and sale is no defence as it only removes the prohibition of the order but gives no authority beyond the right to disregard such order-in-council.

Rex v. Malcolm and Olson, 42 D.L.R. 90, 13 A.L.R. 511, [1918] 2 W.W.R. 1081.

COMPENSATION.

See Payment; Expropriation; Damages; Crown.

Workmen's compensation, see Master and Servant, V.

CONDEMNATION PROCEEDINGS.

See Expropriation; Damages, III L.

CONDITIONAL SALE.

See Sale.

CONDITIONS.

See Contract; Sales; Deeds; Vendor and Purchaser; Landlord and Tenant.

As to limitation of carrier's liability, see Carriers; Shipping.

CONFESSION.

See Evidence.

Judgment by, see Judgment.

CONFLICT OF LAWS.

I. As to rights.
- A. In general.
- B. As to contracts; insurance.
- C. Status; marriage; domestic relations; legitimation.
- D. Corporate matters.
- E. Torts and crimes generally.
- F. Insolvency; assignments for creditors.
- G. Rights in property generally.
- H. Transfers of property generally.
- I. Chattel mortgages; conditional sales.
- J. Descent and distribution; wills.

II. Remedies.

Annotation.

Validity of foreign divorce; domicile: 33 D.L.R. 146, 156.

I. As to rights.

A. In general.

Civil rights of aliens, see Aliens.

B. As to contracts; insurance.

(§ I B—10)—Contract of employment—Ship—Lex loci.

Where the contract of hire by a workman for the loading of a steamer is made in Ontario, and an accident occurred to the labourer in Quebec, while at his work on the wharf, it is the law of the Province of Quebec which applies, and not the law of the Province of Ontario.

Lennon v. Montreal Transportation Co., 53 Que. S.C. 239.

C. Status; marriage; domestic relations; legitimation.

(§ I C—66)—Marital rights.

The law of the province where a marriage takes place governs, as to the form of the marriage, but the domicile of the husband governs as to the marital rights and obligations of the parties. [See annotation 30 D.L.R. 14, also 33 D.L.R. 146.]

Reid v. Pinault, 39 D.L.R. 152, 53 Que. S.C. 156, 24 Rev. de Jur. 59.

D. Corporate matters.

See Companies.

F. Insolvency.

(§ I F—120)—Bankruptcy—Foreign discharge — Promissory note — Right to sue.

A discharge in bankruptcy by a Court of a foreign state from liability on a promissory note made by the bankrupt while domiciled in such foreign state and payable therein, is a good defence to an action here upon the note. Where a promissory note made, and payable, in Canada while the maker was domiciled here is a renewal of a note from which the maker had been discharged by the Courts of a foreign state wherein the original note was made, the maker may be sued in Canada upon the renewal note if it be the law of such foreign state that the moral obligation to pay the original note constitutes a good consideration for a new promise to pay.

International Harvester Co. v. Zarbok (Sask.), [1918] 3 W.W.R. 38, 11 S.L.R. 354.

J. Descent and distribution; wills.

Foreign executors, see Executors and Administrators.

(§ I J—147)—Validity of will—Land—Situs—Religious uses.

The validity of a will of immovables is determined by the laws of the place where the property is situate, and this rule is not affected by the Devolution of Estates Act. [Re Ostrander Estate, 8 W.W.R. 367, followed.] Quære, whether the fact that it is not land but the proceeds of land which is to be distributed under a will affects the validity of, or the right of the Court where the land is situate to pass upon the validity of, a bequest thereof.

Re Millar Estate; Re Trustee Act and Rules of Court (Sask.), [1918] 1 W.W.R. 87.

II. Remedies.

(§ II—150)—Provincial moratory laws—Actions in England—Injunction.

Quære, whether a resident of British Columbia could be penalized for bringing an action in the English Courts in direct opposition to the terms of the B.C. War Relief Acts, or an injunction could be obtained in that province to restrain him from so violating the prohibitions of the statute.

Merchants Bank v. Eliot (Eng.), [1918] 1 W.W.R. 698.

Verbal evidence — Admissibility — Loan —Lex fori.

The admissibility of verbal evidence to prove a loan, cash advances and recovery of the value of articles appropriated, is governed by the lex fori; and according to our law a loan of $500 cannot be established by testimonial evidence.

Abbott v. Arnton, 24 Rev. Leg. 236.

CONSERVATORY ATTACHMENT. (QUE.).

See Attachment; Garnishment; Execution; Levy and Seizure.

CONSIDERATION.

See Contracts; Bills and Notes; Deeds; Fraudulent Conveyances; Assignment for Creditors; Bills of Sale; Chattel Mortgage.

CONSOLIDATION.

Of actions, see Action.

CONSPIRACY.

(§ II—5)—To defraud—Sufficiency of evidence—Identity.

The defendants were tried by a County Court Judge without a jury upon a charge of conspiring to defraud the complainant. At the trial the complainant, in the witness-box, would not swear positively that the defendant H., then present in court as a prisoner in the dock, was the man or one of the men who had defrauded him, although he had identified the same man at the preliminary hearing in the police court. The complainant said: "To the best of my knowledge he was the man. . . . . There is another man here to-day, and I am undecided which it is." The County Court Judge thought the evidence of identity sufficient, and convicted the two defendants: —Held, that the conviction could not be disturbed, there being some evidence to sustain it. Per Clute and Riddell, JJ. (Mulock, C.J. Ex., contra), that, if there had been a jury the case could not have been withdrawn from them.

Rex v. Harvey and Taylor, 42 O.L.R. 187.

(§ III A—10)—To injure one in employment—Overt act.

A person cannot conspire with others to induce himself to reduce the salary of an employee, and thereby injure the reputation of such employee. A conspiracy to be actionable must be followed by an overt act in furtherance thereof.

Patterson v. Canadian Pacific R. Co., 38 D.L.R. 183, 12 A.L.R. 474, [1918] 1 W.W.R. 40. [See 33 D.L.R. 136, 10 A.L.R. 408.]

(§ III B—15)—To injure one in his employment—Proof—Damages.

Williams v. Local Union of United Mine Workers (Alta.), 41 D.L.R. 719, [1918] 2 W.W.R. 767, affirmed in 45 D.L.R.

CONSTABLES.

Arrest by, see Arrest.

CONSTITUTIONAL LAW.

I. In general; governmental matters.
- A. Adoption; amendment; construction.
- B. Ex post facto and retrospective laws.
- C. Vested rights.
- D. Delegation of powers.
- E. Separation of powers.
- F. Local self-government.
- G. Functions and powers of Dominion and province.
- H. Abandonment of power.

II. Rights of persons and property.
- A. Equal protection and privileges; abridging immunities and privileges.
- B. Guaranty of right to life, liberty and property.
- C. Police power.
- D. Freedom of speech, press and worship.
- E. Natural rights; implied guaranties.
- F. Guaranties of justice.
- G. Impairing obligations of contracts.

Provincial powers as to taxes, see Taxes.

As to public domain, see Public Lands; Escheat.

Annotations.

Property and civil rights; non-residents in province: 9 D.L.R. 346.

Power of legislature to confer authority on Masters: 24 D.L.R. 22.

Denominational school privileges; constitutional guaranties: 24 D.L.R. 492.

Powers of Dominion and provinces to incorporate companies: 26 D.L.R. 294.

Property clauses of the B.N.A. Act; "Public Harbours": 26 D.L.R. 69.

Provincial and Dominion rights to escheated lands: 26 D.L.R. 137.

Power of legislature to confer jurisdiction on Provincial Courts to declare the nullity of void or voidable marriages: 30 D.L.R. 14.

Constitutional powers, as to creation of Courts and to appointments thereon: 37 D.L.R. 183.

Fisheries; tidal waters; the 3 mile limit: 35 D.L.R. 28.

The "Crown": 40 D.L.R. 366.

I. In general; governmental matters.

D. Delegation of powers.

(§ I D—82)—War Measures Act—Military Service Act.

The Parliament of Canada had power, under the ambit of authority conferred upon it by the British North America Act, to delegate to the Governor-in-council power to make from time to time such orders and regulations as he may by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary or advisable as provided by the War Measures Act, 1914. These delegated powers are declared not to be limited or affected by sec. 13 (5) of the Military Service Act, 1917, and are wide enough to include the orders-in-council of April 20, 1918, cancelling the exemptions granted under the Military Service Act. [Re Lewis, 41 D.L.R. 1, referred to.]

Re Gray; Re Habeas Corpus, 42 D.L.R. 1, 57 Can. S.C.R. 150, [1918] 3 W.W.R. 111.

Orders and regulations made by virtue of a delegated authority from a legislature are open to review by the courts and are invalid if they do not come within the powers conferred by the legislative enactment, or are inconsistent with the direct enactments of the legislature which conferred the delegated power. Order-in-council passed April 20, 1918, cancelling exemptions granted under the Military Service Act, 1917, held to be ultra vires. [Review of legislation.] [See annotation 13 D.L.R. 722.]

Re Lewis; Re Habeas Corpus, 41 D.L.R. 1, 13 A.L.R. 423, [1918] 2 W.W.R. 687.

HABEAS CORPUS — SUSPENSION OF — WAR MEASURES ACT — MILITARY SERVICE ACT—ALIENS.

1. Section 5 of the order-in-council of April 30, 1918, purporting to suspend the right of habeas corpus ad subjiciendum "Canada Official Gazette," May 18, 1918, t. 51, n. 46, p. 4027, is ultra vires of the powers of the executive because it is authorized neither by the War Measures Act of 1914 (5 Geo. V., ch. 2), nor by the Military Service Act of 1917 (7-8 Geo. V., ch. 19), nor by any express and formal law of the federal parliament. 2. In ordering that those who claim not to fall under the provisions of the Military Service Act of 1917 (whether on account of age, status, or nationality) should carry with them, at all times, their birth or marriage certificate, as the case may be, or a certificate, if aliens, signed by the consul or vice-consul of the country of which they are subjects—the said order-in council of April 30, 1918, is intra vires of the powers which sec. 6 of the said War Measures Act gives and confers upon the executive. 3. The only penalty which the federal parliament has permitted the executive to prescribe for infraction of the provisions of the order-in-council of April 30, 1918, is a fine or imprisonment, or both, by sec. 10 of the War Measures Act of 1914, but not the suspension of the remedy of habeas corpus ad subjiciendum, accorded by sec. 1120 of the Criminal Code to all persons incarcerated in criminal matters. 4. The issue of the writ of habeas corpus ad subjiciendum cannot be refused; the writ is of right, and is accorded ex debito justitiæ. 5. In all matters concerning the liberty of the subject, the acts of the Crown, its Ministers, the members of the Privy Council, or the executive are subject to revision and control by the Court and its Judges, by way of habeas corpus ad subjiciendum. (16 Chas. I., ch. 10.) The military tribunals and officers are also subject to this revision. 6. By sub-par. (c) of the first section of the said order-in-council of April 30, 1918, with sec. 2 thereof, the presumption, prima facie, of the liability of an alien for military service, when he has not in his possession the necessary consular certificate, establishing his nationality, can be rebutted and destroyed by contrary proof. [See annotation 13 D.L.R. 722.]

Perlman v. Piché and Att'y.-Gen'l. of Canada, intervenant; Re Habeas Corpus, 41 D.L.R. 147, 54 Que. S.C. 170, 24 Rev. de Jur. 438. [See 24 Rev. de Jur. 578.]

(§ I D—85)—CRIMINAL LAW AND PROCEDURE.

It was competent to the Parliament of Canada under sec. 91 (27) of the B.N.A. Act, 1867, Imp., in legislating as to criminal law and procedure, to declare that what might previously have constituted a criminal offence should no longer do so, although a procedure in form criminal was kept alive.

Toronto Railway Co. v. The King, 38 D.L.R. 537, [1917] A.C. 630, 29 Can. Cr. Cas. 29, reversing 25 D.L.R. 586, 25 Can. Cr. Cas. 183, 34 O.L.R. 589.

(§ I D—100)—TEMPERANCE ACT—MUNICIPALITY.

The Temperance Act of Quebec (R.S.Q., arts. 1316 to 1328) is of a private and local nature; it has effect only in the localities which adopt it; it has not in view the regulation of the trade generally, but only the particular interest of the municipalities. It is, therefore, constitutional. The Quebec Legislature has the right, without abdicating any of its prerogatives, or any of its rights, to confer upon municipalities the power to prohibit, within their own limits, the trade in intoxicating liquors. So the proceedings taken by a city clerk, at the request of the required number of municipal electors, to convene a public meeting for the purpose of adopting a by-law prohibiting the sale of intoxicating liquors in the municipality, are legal. Municipal institutions in this province relieve the legislature; it can organize them as it wishes, and distribute powers as it thinks desirable. It does not violate any principle by leaving the initiative of the adoption or abrogation of any by-law whatsoever conjointly to the council and to the municipal electors. The fact that a municipality already had in its charter power to prohibit within its limits the sale of intoxicating liquors, does not withdraw it from the application of the Temperance Act of Quebec, which is a law complete in itself and independent of any municipal charter. The unconstitutionality of an Act cannot be pleaded unless eight days' previous notice has been given to the Attorney-General. Municipal electors have a right without proving special interest to intervene in an action brought to have declared illegal proceedings having in view the adoption of the Temperance Act of Quebec.

Valois v. City of Sorel, 53 Que. S.C. 45.

MUNICIPAL POWER TO CONFISCATE PROPERTY INJURIOUS TO PUBLIC HEALTH—"GARBAGE."

Whatever may be the extent of the general power of the legislature to confiscate property, there is no doubt that it has power to confiscate or otherwise deal with any property which is or may be a menace to the public health and to delegate that power to municipalities. Sec. 22 of the Edmonton City Charter Amendment, ch. 45, 1917, authorizing the passing of a by-law establishing a system for the removal of garbage, etc., and by-law no. 14 passed thereunder held valid. "Garbage," within the meaning of said by-law, includes decayed fruit and vegetables in or about a warehouse.

Rex v. Chadderton (Alta.), [1918] 3 W.W.R. 209.

G. FUNCTIONS AND POWERS OF DOMINION AND PROVINCE.

(§ I G—140)—INTOXICATING LIQUORS—SOLICITING ORDERS — TRANSACTIONS WITHIN PROVINCE.

The Manitoba Legislature had legislative authority to pass the Manitoba statute of

1917, 7 Geo. V., ch. 50, in so far as it prohibits residents of Manitoba taking orders in Manitoba on behalf of liquor dealers outside of the province for the supply of intoxicating liquors for beverage purposes to persons within the province. [Attorney-General of Manitoba v. Manitoba License Holders Association, [1902] A.C. 73, specially referred to.]

Rex v. Shaw, 29 Can. Cr. Cas. 130, 28 Man. L.R. 325.

DEPRIVATION OF PROPERTY WITHOUT COMPENSATION.

There is no doubt that a province, by clear and distinct legislation dealing with civil rights, may deprive a person of his property therein without compensation. [Re McDowell & Town of Palmerston, 22 O.R. 563, and Liquidators of Maritime Bank v. Receiver-Gen. of N.B., [1892] A.C. 437, cited.] Such an intention should not, however, be imputed to the legislature unless expressed in unequivocal terms. [Com. of Public Works v. Logan, [1903] A.C. 355, at p. 363, followed.]

Nelson v. Pacific Great Eastern R. Co., [1918] 1 W.W.R. 597, 25 B.C.R. 259.

II. Rights of persons and property.

A. EQUAL PROTECTION AND PRIVILEGES; ABRIDGEMENT OF IMMUNITIES AND PRIVILEGES.

(§ II A—154)—DENOMINATIONAL SCHOOLS—APPOINTMENT OF COMMISSION.

The Act of 7 Geo. V., ch. 59, respecting the appointment of a Commission for the Ottawa Separate Schools, is within the legislative authority of the Legislature of the Province of Ontario. [Ottawa Separate School Trustees v. Ottawa Corporation, 32 D.L.R. 10, [1917] A.C. 76, and the Act of 5 Geo. V., ch. 45, distinguished. See annotation 24 D.L.R. 492.]

Re Ottawa Separate Schools, 40 D.L.R. 465, 41 O.L.R. 259. [See 43 O.L.R. 637.]

SEPARATE SCHOOLS ACT—ULTRA VIRES—APPOINTMENT OF COMMISSION—EXPENDITURES—CONVERSION OF TRUST FUNDS—DAMAGES.

After the decisions of the Privy Council in Ottawa Separate School Trustees v. Mackell, [1917] A.C. 62, 32 D.L.R. 1, affirming the validity of reg. 17 of the Dept. of Education for Ontario, and in Ottawa Separate School Trustees v. Ottawa, [1917] A.C. 76, 32 D.L.R. 10, declaring the Ontario Act 5 Geo. V., ch. 45, (sec. 3) ultra vires, actions were brought by the Board of Trustees of the Roman Catholic Separate Schools of the City of Ottawa against the Commissioners who were appointed, under the Act mentioned, to manage and control those schools, and against two banks, to recover certain moneys of the plaintiffs taken over by the defendants under the authority of that Act. All the funds sought to be recovered were raised by taxation imposed by the plaintiffs under the Separate Schools Act:—Held (1), that, if the powers and rights and duties conferred by the Separate Schools Act might be called a trust, and the moneys raised for school purposes thereunder trust moneys, the transfer of such rights and powers and the funds raised thereunder to the Commissioners was in breach of the trust—the Separate Schools Act contemplating that the Board of Trustees had the exclusive right, privilege, and duty to exercise and discharge those rights, privileges, and duties; and the application of the funds by the Commissioners to the purposes of the trust was no answer to the actions. (2) That the Act passed by the Ontario Legislature in 1917, after the decisions of the Privy Council—an Act respecting the Roman Catholic Separate Schools of the City of Ottawa—7 Geo. V., ch. 60, declaring in effect that all expenditures made by the Commissioners were valid and binding on the plaintiffs, was ultra vires. Sec. 93 of the British North America Act, 1867, must be read with sec. 92; and, while sec. 93 expressly gives to the Provincial Legislature the exclusive right to make laws in relation to education, that right is subject to the provisions following, the first of which is that nothing in such laws shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons had by law in the province at the Union. The effect of the Act 7 Geo. V., ch. 60 was, to affect prejudicially some of the rights or privileges of the plaintiffs as a Board of Separate School Trustees. That Act was to be regarded only as an ineffectual means of getting rid of the effect of the declaration of the Privy Council that 5 Geo. V., ch. 45 was ultra vires. (3) That another Act passed by the Ontario Legislature in 1917—an Act respecting the Appointment of a Commission for the Ottawa Separate Schools—7 Geo. V., ch. 59, was not applicable to the questions before the Court in these actions. (4) That, although the expenditures made by the Commissioners were ultra vires and the Acts of 1917 had not the effect of making the plaintiffs liable for the acts of the Commissioners, yet, inasmuch as a large portion of the expenditure found its proper place and application in carrying on the schools, the Court could recognise this portion of the expenditure and preclude the recovery of the plaintiffs to that extent. At the moment when the Commissioners took control of the moneys and property of the plaintiffs, there was a conversion; and the plaintiffs were entitled to recover damages commensurate with their loss by the conversion. The measure of the loss was the amount of the funds converted; but the funds were trust funds which the plaintiffs were bound to apply to the conduct and management of the schools; the teachers, officers, and employees had been hired by the plaintiffs; an indebtedness had accrued or was accruing; and from the amount to be recovered by the plaintiffs should be deducted a sum repre-

senting the amount by which the plaintiffs were relieved from their obligations in respect of salaries and the conduct and management of the schools. This was but natural justice.

Ottawa Separate School Trustees v. Quebec Bank, 41 O.L.R. 594, reversed in 15 O.W.N. 88, 43 O.L.R. 637.

(§ II A—195)—KEEPING INTOXICATING LIQUOR FOR EXPORT.

The Saskatchewan Act to prevent the keeping of liquor for export to other provinces or to foreign countries is ultra vires as an interference with trade and commerce and not within the jurisdiction of a Provincial Legislature. [Attorney-General of Ontario v. Attorney-General of Canada, [1896] A.C. 348, and Attorney-General of Manitoba v. Manitoba License Holders, [1902] A.C. 73, applied.]

Hudson Bay Co. v. Heffernan, 39 D.L.R. 124, 10 S.L.R. 322, 29 Can. Cr. Cas. 38.

INTOXICATING LIQUOR FOR EXPORT.

Gold Seal Company v. Attorney-General (Sask.), 29 Can. Cr. Cas. 244.

BANKS — POWER OF PROVINCE TO INCORPORATE.

A provincial legislature has power to incorporate a company with the object of carrying on that branch of banking which consists of accepting money on deposit, paying interest thereon and allowing the customer to issue cheques against such deposit.

Re Dominion Trust Co., U.S. Fidelity's Case; Reid's Case; Ramsay's Case (B.C.), [1918] 3 W.W.R. 1023.

B. GUARANTY OF RIGHT TO LIFE, LIBERTY AND PROPERTY.

(§ II B—369)—ANIMAL CONTAGIOUS DISEASES ACT — "PROPERTY AND CIVIL RIGHTS."

The Animal Contagious Diseases Act, R.S.C. 1906, ch. 75, does not give a right of action to a buyer of animals who suffers damage from a sale which is illegal under that Act. [Ward v. Hobbs, 10 App. Cas. 13, followed.] In interpreting this statute there must be taken into consideration, in addition to the rules applicable to penal statutes generally, the fact that it is a Dominion statute relating to agriculture, and to hold that it gives a right of action for damages would be to hold that parliament intended to legislate not only for public order and safety, but also over "property and civil rights," thereby invading the provincial jurisdiction. Where the field is one wherein there is concurrent jurisdiction such intention should not be found in the absence of express enactment or necessary intent.

O'Mealey v. Swartz (Sask.), [1918] 3 W.W.R. 98, 11 S.L.R. 376.

CONTEMPT.

I. WHAT CONSTITUTES.
- A. In general.
- B. Charge against Judge; publication as to pending case or judicial decision.
- C. Disobedience.

II. PROCEDURE.

I. What constitutes.

C. DISOBEDIENCE.

(§ I C—10)—HABEAS CORPUS—DISOBEDIENCE OF WRIT BY MILITARY OFFICER—ATTACHMENT — SHERIFF — POSSE COMITATUS.

The refusal of a military officer to obey an order of a Judge of the Supreme Court commanding him to appear in Court with a draftee in his custody who has applied by way of habeas corpus for his discharge, is not legally justified by the orders of a superior officer not to do so, or by an invalid order-in-council directing military officers to disregard such orders by the Court. If the command of the writ of habeas corpus is disobeyed the usual remedy by attachment may be resorted to; and in addition the Court may, by appropriate writ, order the sheriff to take the body of the draftee and produce him in Court, and in either case if the sheriff meets with resistance his duty is to take with him all able-bodied men in his district and go in person to execute the writ. [Statute of Westminster (2nd) 1285 ch. 39, secs. 22-24.].

Re Norton (Alta), [1918] 2 W.W.R. 865, 13 A.L.R. 457.

(§ I C—14)—FAILURE TO OBEY ORDER—DEFENCE—ILLITERACY.

A defendant against whom a capias has been maintained, and who is condemned to jail and imprisoned for having neglected to comply with an order of the Court enjoining him to give himself up to the sheriff, can recover his liberty if he shews that he can neither read or write, and that he had no knowledge of the order except the plaintiff's right under art. 926 C.C.P.

Myers v. Théort, 54 Que. S.C. 358.

II. Procedure.

(§ II—15)—COMMITTAL OF DEFENDANT—PURGING CONTEMPT — UNDERTAKING — DISCHARGE FROM CUSTODY.

Latchford v. Chartrand, 15 O.W.N. 168.

CONTEST.

Of elections, see Elections, IV.
Of will, see Wills, I.

CONTRACTORS.

See Contracts; Mechanics' Liens.

CONTRACTS.

I. NATURE; FORM AND REQUISITES.
- A. In general.
- B. Implied agreement.
- C. Consideration.
- D. Meeting of minds; definiteness; offer and acceptance.
- E. Formal requisites; Statute of Frauds.

F. Incorporating extrinsic document.
G. Merger.
II. Construction.
A. In general.
B. Entirety.
C. Time.
D. Particular words, phrases and cases.
III. Validity and effect.
A. In general.
B. Illegal by express provision.
C. Public policy.
D. Gambling and wager contracts.
E. In restraint of trade.
F. Ratification; validating; holding out as agent.
G. Remedies; proceeds of unlawful contract.
IV. Performance; breach.
A. In general.
B. Excuse for failure of performance.
C. Incomplete performance; sufficiency of performance.
D. Condition; certificate of performance.
E. Breach and its effect.
F. Time.
V. Change or extinguishment.
A. In general.
B. Termination.
C. Rescission; cancellation.
VI. Actions; liabilities.
A. In general.
B. Defences.
VII. Public contracts.
A. In general.
B. Advertisements and bids; letting.
VIII. Wrongful interference with.

Of corporations generally, see Companies; Municipal Corporations; Associations.

Mistake as affecting, see Mistake.

Relief from penalties or forfeitures, see Forfeiture.

Assignment of, see Assignment.

Limitation of liability, see Carriers, II.

Measure of damages for breach, see Damages.

Admissibility of parol evidence as to, see Evidence, VI.

Of guaranty, tsee Guaranty; Bonds; Principal and Sureay.

Power of mrried woman to contract, see Husband and Wife.

By incompetent persons, see Insane Persons; Infants.

Injunction .to protect contract rights, see Injunction, Ic

Of insurane, see Insurance.

As to when Statute of Limitations begins to run, see Limitations of Actions.

As to Mortgages, see Mortgage.

For partnership, see Partnership.

By agent, see Principal and Agent; Brokers.

Registration requirements, see Registry Laws; Bills of Sale; Chattel Mortgage; Land Titles; Deeds; Mortgage.

Of sale of goods, see Sale.

Specific performance of, see Specific Performance.

For purchase of land, see Vendor and Purchaser; Land Titles.

Effect of war, contracts with alien enemies, see Aliens.

As affected by moratorium, see Moratorium.

Annotations.

How affected by moratorium: 22 D.L.R. 865.

Effect of war on contracts with alien enemies: 23 D.L.R. 375.

Building contracts; architects' duty to employer: 14 D.L.R. 402.

Extras in building contracts: 14 D.L.R. 740.

Failure of consideration; recovery of consideration by party in default: 8 D.L.R. 157.

Failure of contractor to complete work on building contract: 1 D.L.R. 9.

Illegality as affecting remedies; relief: 11 D.L.R. 195.

Money had and received; consideration; failure of; loan under abortive scheme: 9 D.L.R. 346.

Oral contract; Statute of Frauds; signature; effect of admission in pleading: 2 D.L.R. 636.

Part performance; acts of possession and the Statute of Frauds: 2 D.L.R. 143.

Part performance excluding the Statute of Frauds: 17 D.L.R. 534.

Restrictions in agreement for sale as to user of land: 7 D.L.R. 614.

Statute of Frauds; signature of a party when followed by words shewing him to be an agent: 2 D.L.R. 99.

Stipulation as to engineer's decision; disqualification: 16 D.L.R. 441.

Time; when time of essence of contract; equitable relief from forfeiture: 2 D.L.R. 464.

Rescission for misrepresentation; waiver: 21 D.L.R. 329.

Rescission of contract for fraud and damages for deceit: 32 D.L.R. 216.

I. Nature; form and requisites.

B. Implied agreement.

(§ I B—6)—To pay for services—Promise of legacy.

Where a person often served as the testator's guide for fishing and hunting, without an agreement as to wages, but by the testator's promise that he would provide for him in his will, which he did not do, a universal legatee must pay the value of the services of such person for the period of time not prescribed.

Laplante v. Archambault, 24 Rev. Leg. 458.

(§ I B—8)—Services rendered by niece—Presumption.

The defendant had at her request brought her aunt to her (the defendant's) house; the aunt, who was suffering from an incurable disease, continued to live with and be cared for by the defendant for nearly a year, when the aunt and the defendant both went to

reside with defendant's sister, where the defendant looked after the aunt until her death. The Court held, under the circumstances of the case, that large sums of money paid by the aunt to the defendant were intended to enable the defendant to defray the costs of maintenance, nursing, medical supplies and other necessaries of the aunt, and that, in accounting, the defendant was entitled to a reasonable sum for her services in addition to the money disbursed on the aunt's account. The evidence was sufficient to rebut the presumption of gratuitous service on account of the relationship.

Mercantile Trust Co. of Canada v. Campbell, 43 D.L.R. 388, 43 O.L.R. 57, reversing 13 O.W.N. 144.

C. Consideration.

(§ I C—10)—Promise by third party—Right of action.

A promise or undertaking by a third party to a debtor to pay his debt does not give the creditor any right of action against the promissor.

Canadian Moline Plow Co. v. Trea, 39 D.L.R. 581, 13 A.L.R. 354, [1918] 1 W.W.R. 645.

(§ I C — 14) — Illegal consideration — Recovery back.

Where the consideration upon which an agreement to give money or property or a security is illegal, e.g., the stifling of a criminal prosecution, the money or property cannot be recovered back or the security set aside at the instance of the person who has agreed to give it, on the ground of the illegality of the transaction, if it is no longer executory but has been carried into execution. [Wood v. Adams (1905), 10 O.L.R. 631; Jones v. Merionethshire Permanent Building Society, [1892] 1 Ch. 173, referred to.]

Fairweather v. McCullough, 43 D.L.R. 525, 43 O.L.R. 299; 14 O.W.N. 329 affirming 14 O.W.N. 175.

(§ I C—26)—Maintenance of aged—Moneys in joint account—Personal representatives.

Where a letter addressed to a bank in which deceased had his moneys deposited, directing the bank to open an account in the names of the deceased, his wife, and daughter, and authorizing the bank to pay all moneys to the credit of such account to any one of the three and the survivor or survivors and signed by all three, is shewn to be in pursuance of an agreement whereby the daughter and her husband were to take care of deceased and his wife during their lives, in return for which he was to give them all his property, and where the agreement is being carried out and the widow of the deceased is living with the daughter and is strenuously opposing the action, which is in the circumstances not improvident, an action against the mother and daughter for a declaration, that the money in the bank belongs to the personal representatives, will be dismissed. [Empey v. Fick (1907), 13 O.L.R. 178, 15 O.L.R. 19, followed.]

Burkett v. Ott, 41 D.L.R. 676, 41 O.L.R. 578; 13 O.W.N. 351 affirming 12 O.W.N. 309. [Reversed by the Supreme Court of Canada.]

(§ I C — 29) — Company — Transfer of shares—Specific performance.

Franklin v. Reardon, 39 D.L.R. 176, 55 Can. S.C.R. 613, affirming 35 D.L.R. 380, 51 N.S.R. 161.

Underwriting preference shares of company — Consideration — Commission paid in part in ordinary shares — Undertaking of promoters to buy shares from underwriter at reduced price—Alternative provision as to sale of shares in event of underwriter retaining them — Election — Evidence — Continuing right—Construction of contract — Receipt — Reasonable time for making request to buy—Oral evidence of surrounding circumstances.

Rountree v. Wood, 15 O.W.N. 264.

D. Meeting of minds; definiteness; offer and acceptance.

(§ I D—45)—Consent.

When there is a reasonable doubt as to the consent by one of the parties to a contract, it is the duty of the Court to decide against such consent and refuse enforcement of the contract.

Beland v. Quebec Southern R. Co., 24 Rev. Leg. 58.

Formation — Correspondence — Sale of goods — Delivery and acceptance — Payment for certain deliveries — Evidence — Agency for another company—Action for price of goods —Appeal — Parties — Leave to add principal company as defendants — New trial.

York Sand and Gravel, Limited v. William Cowlin and Son, Limited, 14 O.W.N. 89, reversed in 14 O.W.N. 189.

Formation — Written offer to carry goods at named price—Oral acceptance — Evidence — Findings of fact of trial Judge.

Austin & Nicholson v. Canada Steamship Lines, 14 O.W.N. 191, affirmed in 15 O.W.N. 371.

(§ I D—46)—Sale of goods—Innocent misrepresentation — Delivery — Delay — Breach of warranty.

Canada Law Book Co. v. Yule (Sask.), 41 D.L.R. 746, [1918] 2 W.W.R. 983, reversing [1918] 2 W.W.R. 250.

(§ I D—55)—Uncertainty — Letters — Specific performance.

The defendant by letter gave the plaintiff a 15-days option on seven timber licenses on a basis of 50 cents a thousand stumpage net, adding that if the plaintiff approved of the timber, he (the plaintiff) should have the timber surveyed and pay all back licenses

and all future payments and that an agreement of sale will be entered into if he takes his option up. In answer by letter the plaintiff stated that he had inspected the timber comprised in the seven timber licenses upon which he held a fifteen days' option and agreed to purchase same on lines of said option. Held, that the two letters do not constitute an enforceable agreement, it being void for uncertainty. Decision of Murphy, J., affirmed.

McMillan v. Cameron, 24 B.C.R. 509, [1918] 1 W.W.R. 836.

(§ I D—60)—Sale of wheat—Offer and acceptance.

Badger v. Torosoff (Sask.), 39 D.L.R. 606, [1918] 1 W.W.R. 496.

Place of contract—Acceptance—Agent. —Ratification.

A contract of hire of services negotiated with an agent of the employer, subject to ratification by the latter, is completed at the place where it is ratified.

Swan v. Roy, 19 Que. P.R. 298.

Place of contract—Correspondence.

If correspondence takes place between the parties, who make a series of propositions and counter-propositions, the contract is completed at the point where the last modification is made.

Laferte v. Martel, 19 Que. P.R. 249.

Sale of timber — Agreement in writing— Prices of different kinds of timber— Waiver of objection to contract— Ratification—"Mill-run."

Douglas v. Bury, 14 O.W.N. 241, affirmed in 15 O.W.N. 283.

Agreement for supply of manufactured goods — Formation of contract — Written memorandum — Evidence of surrounding circumstances — Admissibility — Authority of agent of company — Apparent mandate — Necessity for new machinery to manufacture goods ordered—Effect on question of authority — Approbation of contract — Ratification — Subsequent repudiation — Necessity for specifications by buyers — Custom of trade — Furnishing of credit —Term of contract — Notice of intention to cancel — Damages — Increased prices of goods — Increase in freight rates—Expenses of special journey—Remoteness.

Rownson Drew & Clydesdale v. Imperial Steel and Iron Co., 14 O.W.N. 298.

(§ I D—62)—Threats—Vitiation.

Forcing a contractor to sign a letter consenting to a certain interpretation being given to a contract, on the threat that if it is not signed all further payments to him will be stopped, which would cause the financial ruin of the contractor, is sufficient to vitiate the consent thus given.

Vinet v. Canadian Light & Power Co., 42 D.L.R. 709, 54 Que. S.C. 134.

Commercial traveller—Power to accept order.

In the absence of express authority a commercial traveller has no authority to accept an order on the merchant's behalf; he merely takes the order and submits it to his principal for acceptance or refusal.

Lamontagne v. C. Parsons & Son, 42 D.L.R. 365, 54 Que. S.C. 297.

E. Formal requisites; Statute of Frauds.

(§ I E—80)—Promise of deceased mortgagee (aunt of mortgagor) to cancel mortgage in consideration of services and goods supplied—Statute of Frauds—Action against administrator with will annexed — Evidence— Legacy given to mortgagor — Findings of trial Judge — Appeal—Costs —Payment for goods supplied.

Menzies v. Bartlet, 15 O.W.N. 115, varying 15 O.W.N. 8.

(§ I E—84)—Right of way—Company — Authority — Acquiescence — Repudiation.

An oral agreement for valuable consideration entered into by the president of a commercial company, who had at the time ostensible authority to bind the company, and which has been acted upon and acquiesced in for a number of years will not be set aside.

Acton Tanning Co. v. Toronto Suburban R. Co., 40 D.L.R. 421, 56 Can. S.C.R. 196, 22 Can. Ry Cas. 279.

(§ I E—95)—Sufficiency of writing.

A memorandum in the following terms: "Witness that I have this day sold and agree to deliver to the Smith Grain Company at Port Arthur, Ont., 3,000 bushels wheat on or before Oct. 31, 1914, at an agreed price of 83 cents per bushel basis, 1 Northern, delivered free on board cars at Port Arthur. Government weights and grades to govern. Shipper also pays freight and dockage. I hereby acknowledge receipt of $1.00 on above contract," signed by the owner of the wheat, and witnessed by the agent of the purchaser, is a complete memorandum of the contract of sale and not merely an offer to sell. No further assent by the purchaser is required. Parol evidence is not admissible to vary the terms which appear on the face of the contract.

Smith v. Spencer, 42 D.L.R. 269, 11 S.L.R. 328, [1918] 2 W.W.R. 1073.

Sale of land—Memorandum signed by purchaser — Description — Sufficiency—Specific performance.

The defendant signed a document reading: "A. E. Sparks sell and J. Clement buys the 50 acres of land across the road from him for the sum of $4,000.00 cash:"—Held, that the description was sufficient to identify the

parcel of land sold, and that the contract was enforceable against the Statute of Frauds. (2) That a defence to an action for specific performance brought by the vendor, that the alleged contract was not a real contract at all, the defendant merely signing the document to help the plaintiff to make a sale to another at a good price, was not sustained by the evidence. Semble, per Meredith, C.J.C.P., that the defence that the transaction was not a real one, that is, not that the contract which the plaintiff alleged was unlawful, but that it never was made, was one upon which the defendant might rely. Such maxims as, "No one alleging his own baseness is to be heard," or "A right of action cannot arise out of fraud," were not applicable. Specific performance of the contract decreed.

Sparks v. Clement, 41 O.L.R. 344, reversing 40 O.L.R. 487.

(§ I E—105) — Sale of Goods Act — Memorandum — Whether "signed by party to be charged" — Printed form.

Where the jury, although questioned on the point, fails to find whether a memorandum put forward to satisfy the Sales of Goods Act was "signed by the party to be charged," the Court has power to make the finding [Sewell v. B.C. Towing, etc., Co., 9 Can. S.C.R. 527 at 552, applied]. A printed form of contract containing the names of the defendant companies stamped at the end thereof, and between which the agent of both defendants, before handing the form to a bonding company as evidence of the contract, had written the word "and," held to be "signed by the party to be charged" [Schneider v. Norris, 2 M. & S. 286, followed], and to be a sufficient memorandum to satisfy the Sales of Goods Act, although it made no reference to an agreement by the plaintiffs to give a bond for the due performance of the contract.

Gibb v. Canadian Northern Construction Co. (B.C.), [1918] 1 W.W.R. 575, reversed in 43 D.L.R. 276, [1918] 3 W.W.R. 396.

Sale of goods — Statute of Frauds — Statement of price — Reference to price-list — Incorporation of document by reference — Breach of contract — Damages.

Bimel-Ashcroft Manufacturing Co. v. Chaplin Wheel Co., 15 O.W.N. 52.

(§ I E—111)—Misrepresentation—Lapse of time—Inability to restore.

Misrepresentation as to the revenue derived from a theatre is not sufficient ground for setting aside a sale thereof, where the purchaser has had an opportunity to estimate the amount and has not complained of the small revenue received for several months after taking possession. Especially where such purchaser is in such a position that he cannot restore the business to the vendor if successful in the action.

Rodden v. Sauriol, 42 D.L.R. 220, 24 Rev. Leg. 421.

(§ I E—115)—Part performance — Equitable assignment.

The plaintiff held a mortgage secured by a property occupied by a garage, of which the defendant was owner. They both employed the same agents, who collected the rent, paid the interest on the mortgage and the balance to the owner. Upon certain principal coming due the mortgagee wrote the agents, stating he was willing to forego the payment for six months, but the mortgagor must sign an agreement guaranteeing that a sufficient sum be reserved from the garage rent to pay the interest without lapse until such time as the whole loan be refunded. Upon this letter being shewn the mortgagor he wrote the agents instructing them to act as his sole agents, collect the rents, and pay the mortgage interest regularly until the loan be refunded in full. This arrangement was carried out for a year, when the mortgagor wrote the agents instructing them to cease collecting the rents. The mortgagee then sued the tenant for the rents, claiming there was an equitable assignment thereof and that the revocation was nugatory. On an interpleader issue it was held by the trial Judge that the mortgagor's authority was revocable as there was no sufficient evidence of the agreement to satisfy the Statute of Frauds, and the letter from the mortgagor relied on did not constitute an equitable assignment, as it shewed no consideration on its face. Held, on appeal, that irrespective of the question of equitable assignment, the extending of the time for payment of principal, the benefit of which was accepted by the mortgagor upon his agreeing that the mortgage should be paid out of the rents, was a sufficient part performance of the agreement to take the case out of the Statute of Frauds, and the appeal should be allowed.

Wardroper v. Stewart-Moore, 25 B.C.R. 69.

II. Construction.

A. In general.

(§ II A—128) — Intention — Circumstances and course of dealings.

Where the language used in an agreement is capable of more than one meaning the circumstances surrounding the contract and the course of dealing between the parties may be looked at to see in what sense the parties were using the words.

Burritt v. Stone, 38 D.L.R. 240, 10 S.L.R. 384.

Emphyteutic lease—Intention.

In construing an agreement respecting the unexpired term of an emphyteutic lease, the intention of the parties must be sought, and however ambiguous and involved the language may be, if the intention can be ascertained with reasonable certainty, effect must be given to it.

City of Quebec v. Lampson, 40 D.L.R. 522, 56 Can. S.C.R. 288, reversing 49 Que. S.C. 307.

C. TIME.

(§ II C—140)—SALE OF LAND — TIME — TITLE—REGISTRATION.

A promise of sale which stipulates that on default of making a payment on June 2, and of signing the deed of sale June 3, the deed should be void, becomes cancelled and annulled on the expiration of the delay, without formal demand. Even if, on such date, the vendor's title should not be perfect: that the property offered be encumbered with hypothecs and servitudes; such defects do not prevent the promise of sale from becoming void, the owner not being compelled to remove these charges, if the purchaser does not fulfil the conditions to which he has agreed. A promise of sale of real property, binding only on one party, is not a deed of transfer of the property, and does not, by itself, encumber such property with any real right; it only gives his beneficiary a right of preference over the other purchasers, and only creates a personal obligation, whose carrying out can be demanded, and it is only when it is accepted that the vendor can be compelled to carry it out; it cannot then be registered.

Gohier v. Morrisset, 53 Que. S.C. 505.

D. PARTICULAR WORDS, PHRASES AND CASES.

(§ II D—145)—AGENT — COMMISSION — PARTICULAR WORDS.

An agent whose commissions on sales are to be paid "on orders received through you" is not entitled to commission where from the evidence the only inference is that it was the act of the company's manager alone that secured the order, or where orders were received otherwise than through the agent's efforts.

Band v. Sturgeon Consolidated Collieries, 41 D.L.R. 165, 13 A.L.R. 530, [1918] 2 W.W.R. 912.

PURCHASE OF GOODS—PAYMENT OF FREIGHT —INTERPRETATION OF CONTRACT—EVIDENCE.

Braun v. Peters (Sask.), 43 D.L.R. 754.

SALE OR LOAN — RIGHT TO REDEEM — INTEREST.

One who exercises the right of redemption, is only bound to reimburse his purchasers' capital without interest, and the costs of sale. It is nevertheless possible for the parties to agree that the return of the price of sale shall also include the payment of interest. But, in such case, no interest is due before the redemption has been determined on and the capital reimbursed. If such a contract is made, a stipulation for payment of interest, as well as a clause that the capital can only be returned to the purchaser in 3 years, are elements which contribute to making the agreement deemed to be a loan and not a sale with right of redemption. If such a contract was not a loan, but a sale with right of redemption, the clause declaring that the purchaser must pay interest upon the capital before the expiry of 3 years is void, as imposing a conditional obligation which cannot be performed. One of the surest rules of interpretation of agreements, besides those indicated in arts. 1013, 1018, 1019, C.C. (Que.), is to adopt the meaning that the parties themselves have given to their contract in their carrying it out.

Marcil v. Bureau, 53 Que. S.C. 496.

(§ II D—150)—SUBJECT-MATTER NOT IN ESSE.

Where, from the nature of a written contract, it appears that the parties knew when it was made that it could not be fulfilled unless some particular thing specified therein continued to exist, the contract is not to be construed as positive, but as subject to an implied condition that the parties shall be excused if such existence ceases; and if that principle holds good where the thing has never existed, the situation of the parties, all the surrounding circumstances and the reason of the thing, must be considered in construing the contract.

Carr v. Berg, 38 D.L.R. 176, 24 B.C.R. 422, [1917] 3 W.W.R. 1037, affirming [1917] 2 W.W.R. 94. [Affirmed in [1918] 2 W.W.R. 368.]

(§ II D—152) — WORKMAN — INJURY TO — RECOVERY OF DAMAGES — INDEMNITY CLAUSE.

The appellant having failed in its supply of what it had contracted for, one of the men was sent to get it from the respondent's warehouse. He met with an accident in doing so for which he had recourse against the respondent and rightfully recovered damages. The Court held that the respondent was entitled to be indemnified by the appellant under a clause in an agreement between the parties as follows: "that the S.S. Co. shall hold the Stevedoring Company entirely harmless from any and all liability for personal injury to any of the Stevedoring Company's employees while performing labour embraced within this agreement." The workman at the time he was injured was performing labour embraced in the agreement.

Grand Trunk Pacific Coast Steamship Co. v. Victoria-Vancouver Stevedoring Co., 43 D.L.R. 231, 57 Can. S.C.R. 124, [1918] 3 W.W.R. 450, affirming 38 D.L.R. 468, 25 B.C.R. 6.

(§ II D—156)—AGREEMENT TO LEND MONEY —MORTGAGE OF LAND — BUILDING LOAN — TERMS OF ARRANGEMENT — MONEY NOT TO BE ADVANCED UNTIL BUILDING COMMENCED AND PROGRESS MADE.

Sherwood v. Sheehy, 15 O.W.N. 67.

(§ II D—157)—SUPPLY OF GAS "IN THE CITY"—EXTENSION OF CITY LIMITS.

A contract by the producers to supply all the gas required, to a company empowered to distribute and sell to consumers "in the city" does not extend to territory annexed to the city after the contract was made. [City of Calgary v. Canadian Western Natural Gas Co., 40 D.L.R. 201, 56 Can. S.C.R. 117, distinguished.]

Union Natural Gas Co. v. Chatham Gas Co., 40 D.L.R. 485, 56 Can. S.C.R. 253, reversing 38 D.L.R. 753, 40 O.L.R. 148, which reversed 34 D.L.R. 484.

SUPPLY OF GAS — COVENANT — EXCEPTIONS — BREACH — INJUNCTION — DAMAGES — APPEAL — VARIATION OF JUDGMENT — COSTS.

Dominion Natural Gas Co. v. National Gas Co., 14 O.W.N. 16.

(§ II D—170) — SALE OF LAND — OPTION — PRIVITY.

In a deed of sale of certain lands and property previously held under option, there being doubt in the minds of some of the interested parties as to whether all the rights under the option had lapsed, a clause inserted as between the Crown and its vendors whereby the former would not hold their vendors responsible for any trouble which might arise from said option does not establish any privity of contract as between the Crown and third parties.

Lefebvre v. The King, 38 D.L.R. 674, 16 Can. Ex. 241.

SALE OF LAND—COLLATERAL AGREEMENT.

In the case of an agreement for the sale of land with an independent collateral agreement for the resale of the lots, it is not necessary for the collateral agreement to appear in the agreement for sale. The collateral agreement, being an agreement to sell land, not for the sale of land, is not within the Statute of Frauds.

Canadian General Securities Co. v. George, 43 D.L.R. 20, 42 O.L.R. 560; 14 O.W.N. 71 reversing 13 O.W.N. 355.

SALE OF LUMBER—DESTRUCTION BY FIRE—CHEQUE FOR PRICE — PAYMENT STOPPED —ACTION — INSURANCE — COUNTERCLAIM — NEGLIGENCE — WAREHOUSE RECEIPT — BANK ACT — GRATUITOUS BAILEE — REASONABLE CARE — CAUSE OF FIRE — ENGINE.

The plaintiffs, by writing dated the 14th June, 1910, agreed to sell to the defendant their "cut" of white pine lumber, in the yards of the T. company, "f.o.b. T.," at fixed prices for different grades, and according to terms of payment and delivery specified. Negotiations had been carried on before the written document was prepared, and the defendant sought to shew that it did not contain the whole agreement. The defendant had inspected the lumber before the agreement was made, an invoice of the lumber ready for delivery was sent by the plaintiffs to the defendant, and on the 27th June, the defendant sent to the plaintiffs' bankers a cheque for $61,998.97, the price of the lumber according to the invoice, less 2 per cent. for cash. On the 30th June, a fire occurred in the lumber yards of the T. company, and the cut and piled lumber which was the subject of the agreement, as well as other lumber in the yards, was destroyed. The defendant stopped payment of the cheque and this action was brought to recover the amount of it:—Held, upon the evidence, that the writing embodied the whole contract between the parties; and that the property in the lumber had passed to the defendant before the fire. At the time of the fire, the plaintiffs had existing insurance to the extent of $50,000 upon the lumber in the yards, including that sold to the defendant. The insurance companies paid the plaintiffs the full amount of $50,000, and entered into an agreement with them, reciting that the total loss was $82,972.15, the portion thereof pertaining to the lumber sold to the defendant $63,264.25, and providing that the plaintiffs should sue the defendant upon his cheque, and, if successful, should pay to the insurance companies the surplus remaining after satisfying the plaintiffs' own loss and their costs and expenses:—Held, that the plaintiffs might properly bring the action upon the cheque, even though, if the action succeeded, the insurance companies might benefit thereby; and the plaintiffs were entitled to judgment for the amount of the cheque. Held, also, having regard to the fact that a warehouse receipt for the lumber sold was signed by the plaintiffs and given to the defendants which receipt stated on its face that it was to be regarded as a receipt under the provisions of the Bank Act, 53 Vict. ch. 31, and having regard to the meaning given by that Act, sec. 2 (d), to the expression "warehouse receipt," that the plaintiffs were, at the time of the fire, gratuitous bailees for the defendant of the lumber sold, and were not bound to exercise more than reasonable care and diligence. The T. company (defendants by counterclaim) operated on rails in their yard a small engine, equipped with boiler, smokestack, ash-pan, etc. It was not a standard railway engine such as used on ordinary railways, but one of a smaller kind, used in millyards:—Held, that the Act to preserve the Forests from Destruction by Fire, R.S.O. 1897, ch. 267, had no application to a millyard and an engine running upon rails therein. And held, upon the evidence, that the plaintiffs and their co-defendants by counterclaim had shewn that there was no such want of reasonable care on their part of the lumber in question as a prudent man would exercise with regard to his own property, and had negatived the charge of negligence made against them in the counterclaim.

Ferguson v. Eyer, 43 O.L.R. 190.

TIMBER—SALE—LIEN.

By a contract dated December 16, 1915, between a lumber company and D., it was stipulated that D. should cut on his property 2,000,000 feet of wood, board measure; that he should carry it to the mill, and saw it, and pile it ready to be shipped on order. The lumber company on its part, undertook to make advances to D. on each of his operations and to remit to him the product of sales which it was authorized to make, less advances made, all costs and disbursements,

$1 per 1,000 feet upon the net profit, and $2.50 per 1,000 feet to be applied in reducing the debt. It was provided that the lumber company assumes no risk for sales which it may make D., reserving the right to oppose sales which might offer some risk. Later, on January 26, 1916, D. transferred the wood to the lumber company as security for $7,000 advances. Held, that the lumber company was never the owner of the wood. It never had it in its possession until January 26, 1916, and the possession that the transfer of that date gave to it was only that of a pledge, which could not affect the privilege which the wood cutters then had, and were able to acquire since, for the payment of their wages under R.S.Q. art. 7464. Consequently, the intervention filed in the case, which claims neither privileges nor right of retention but a right of property which the intervening party (the lumber company) has never had, is not well founded.

Pelletier v. Lagace, 24 Rev. de Jur. 21.

SALE OF WOOD—REDEMPTION.

A clause in a contract of sale of a certain quantity of wood, with right of redemption, which authorizes the vendor to exercise his right in part only, according to his need of the wood, must be interpreted in his favour and not against him or in the interest of the purchaser, and, if the vendor so prefers, he may exercise his right of redemption once only.

Heroux v. La Compagnie de Brique et de Sable des Laurentides, 53 Que. S.C. 517.

(§ II D—175)—"F.O.B."—PERFORMANCE OF CONTRACT.

The expression of "f.o.b. cars" in a contract for the sale of wood means that the purchaser ought to place at the disposal of the vendor the cars required to carry the wood, but this rule is modified if the parties have by their actions given to the contract a contrary signification, or if such signification results from circumstances in which the delivery should take place, such as the disposal at the place of delivery, of public vehicles intended for the carriage of similar goods. When one party to a contract carries it out in a certain way he cannot afterwards alter his interpretation and claim that it should be carried out differently, unless a mistake is proved. If a date is fixed for delivery of goods sold, and a portion is delivered before such period, the vendor can not allow the period to elapse and then ask that the sale be voided because the purchaser has not fulfilled his obligations; his silence is a ratification of the way in which the purchaser carried out the contract.

Perras v. Grace, 27 Que. K.B. 343.

SALE OF GOODS — BREACH — CONSTRUCTION OF CONTRACT — "SPECIFICATIONS" — "SPECIFY" — DIMENSIONS OF WIRE — EVIDENCE — EXPLANATION OF TECHNICAL TRADE TERMS.

Owen Sound Wire Fence Co. v. United States Steel Products Co., 15 O.W.N. 206, varying 13 O.W.N. 104.

SALE AND DELIVERY OF GOODS — BREACH — DELIVERY OF SMALLER QUANTITIES THAN THOSE CONTRACTED FOR — "ABOUT" — "APPROXIMATE" — PERCENTAGE ALLOWANCE — DAMAGES — MISTAKE IN WORDING OF WRITTEN CONTRACT — FINDING OF REFEREE — APPEAL.

Susman v. Baker, 15 O.W.N. 122.

(§ II D—185) — LIQUIDATED DAMAGES—INTENTION.

In construing a contract the Court will not go outside of it to ascertain the intention of the parties; where possible damages were evidently the subject of consideration when making the contract and a certain reasonable sum was agreed upon, it will be allowed as liquidated damages.

Farmers' Advocate v. Master Builders' Co., 38 D.L.R. 409, 28 Man. L.R. 340, [1917] 3 W.W.R. 1095, reversing 31 D.L.R. 558.

PENALTY OR LIQUIDATED DAMAGES — AGREEMENT FOR EXCHANGE AND LAND — AGENCY — RATIFICATION.

Though the parties to a contract who use the words "penalty" or "liquidated damages" may primâ facie be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found passim in nearly every case. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach. It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach [Dunlop Pneumatic Tyre Co. v. New Garage, etc. Co., [1915] A.C. 79, followed.] In an action upon an agreement for the sale and exchange of lands (entered into after failure of the defendants to deliver title under a prior agreement) which provided that should the defendant be unable to deliver title, he would pay $25,000 in lieu of the lands, that being agreed upon as their value. Held, that the provision was a penalty, that a reference as to damages should be made, and the defendants given two months within which to carry out the contract. A contract made on behalf of a person, but without his authority, by a person who does not profess to be acting for a principal, cannot be ratified. [Keighley & Co. v. Durant, [1901] A.C. 240, followed.]

Reimer v. Rosen (Man.), [1918] 1 W.W.R. 425, varied in 45 D.L.R.

AGREEMENT TO DO WORK — MISCONCEPTION —MISREPRESENTATION — CHANGES IN PLANS.

Westholme Lumber Co. v. Corp. of City of Victoria (B.C.), 39 D.L.R. 805.

CONSTRUCTION OF PAVEMENTS — GUARANTEE BOND — DEFECTIVE WORK AND MATERIALS — ACTION ON BOND — RECOVERY OF AMOUNT OF BOND LESS SUM EXPENDED IN REPAIRS—FINDINGS OF FACT OF TRIAL JUDGE.

Town of Oshawa v. Ontario Asphalt Block Paving Co., 15 O.W.N. 11, affirmed in 15 O.W.N. 406.

(§ II D — 188) — BUILDING CONTRACT — CROWN — FORFEITURE.

Where a contractor enters into a contract with the Crown for the construction and completion of a public work but subsequently throws up the contract, and the Crown completes the work at a profit, the defaulting contractor is not entitled to the benefit of the saving on his contract price, but is entitled to recover his deposit.

Dussault and Pageau v. The King, 39 D.L.R. 76, 16 Can. Ex. 228, affirmed in 44 D.L.R. 421.

BUILDING CONTRACT — MEASURE OF DAMAGES — ESTIMATES — FRAUD.

Under a contract made between the plaintiffs and defendant on April 28, 1913, the plaintiffs undertook the erection of a building for the defendant. The plaintiffs were to supply the plant and tools necessary in the construction and attend to all details of construction under the supervision of defendant's architect and the defendant was to pay for all labour, material and other charges incidental to the work from time to time as such payments were due and notified to the defendant by plaintiffs. For this work the defendant agreed to pay the plaintiffs a fixed sum of $15,000 subject to increase or deduction by a sum equal to 20% of such sum as ultimately was found to be less than or in excess of $189,000, being the fixed estimated cost of the work. This estimated cost had been furnished by the plaintiffs and was by them guaranteed. The work commenced upon the execution of the agreement and continued until some time in November, 1913, when it stopped because the defendant was unable to furnish the money to carry out his part of the contract. In fact his financial condition had been embarrassing before November and he had become indebted to plaintiffs for advances of about $7,000, which he finally paid in 1916. The defendant in July, 1916, advertised for tenders to complete the building in a modified form. Before any new contract was let he received a letter from plaintiffs protesting against the work being continued under any contract but the one here in question, and warning defendant that he was not relieved from this contract. Without any serious effort, however, to get rid of this contract, the defendant entered into a new one with other contractors. Thereupon this action was brought to recover damages for breach of contract. Judgment was given for the plaintiffs at the trial and reversed on appeal [1917] 3 W.W.R. 1021, on the ground of fraud in making the estimate. The plaintiffs appealed. Held, that the defence of fraud was not available; also, that the plaintiffs were entitled to damages for breach of contract as of the date when the new contract was let by the defendant, and that, in ascertaining such damages, the total cost of the building if completed under the plaintiff's contract had they resumed work on the date of the breach should be estimated, and to the extent to which that cost should exceed or fall below $189,000, 20% thereof should be deducted or added, as the case might be, to the amount to which the plaintiffs might be found entitled in respect of the $10,000 (balance of $15,000, less $5,000 paid), and in ascertaining the damages payable in respect of this item there should be taken into account the value of the time, labour and expense which the plaintiffs were saved through being relieved of their obligation to carry out their contract and any contingencies which might have interfered with their doing so, and that the defendant having broken his contract, was not entitled to anything in respect of the 20% on estimated increased cost over $189,000, except by way of set-off against the plaintiffs' recovery in respect of the $10,000 item.

Jones & Lyttle v. Mackie (Can.), [1918] 2 W.W.R. 82.

BUILDING CONTRACT — AQUEDUCT—CHANGE OF PLAN—EXTRA WORK — QUANTUM MERUIT.

A contract for the construction of an aqueduct, according to a design adopted by the owner's engineers required the contractors to reinforce one section thereof with steel. After the work had been begun the contractors, owing to the development of certain defects, were ordered by the owner's engineers to reinforce the whole work. The trial Judge found that no blame attached to the contractors for these defects, but that they resulted wholly from natural causes, which an aqueduct constructed without steel reinforcement and according to the design contracted for was unable to resist. In an action for the price of the extra steel on a quantum meruit basis, held that the terms of the contract failed to provide for the contingency which resulted in the change of plan and that there was an implied agreement to pay for the extra work and material on a quantum meruit. [Boyd v. South Winnipeg, [1917] 2 W.W.R. 489, applied; Thorn v. London Corporation, 1 App. Cas. 120, distinguished.]

J. H. Tremblay Co. v. Greater Winnipeg Water District (Man.), [1918] 3 W.W.R. 713.

BUILDING CONTRACT — EXTRAS — PAROL EVIDENCE — JURISDICTION OF COURTS — MECHANICS' LIENS.

A contract for the construction of a building containing a clause that "the owner may,

without invalidating the contract, make changes which he deems necessary to make in the plans and specifications of the works to be done, provided, however, that all increases or decreases, as the case may be, be added or deducted," is not a contract for a fixed price to which apply the rules of art. 1690 C.C. (Que.) relating to payment for works resulting from changes or increases made in the plans and specifications. Such contract being of a commercial nature, parol evidence is admissible to prove the works ordered by the owner. A clause in the contract stipulating that all difficulties shall be settled by the architect, whose decision shall bind the parties without appeal, does not take away their recourse before the courts. One who builds upon a lot of land which does not belong to him has not the right to ask for the obliteration of the privileges of a builder, of furnishers of material and of workmen registered upon the building and the land, or the voiding of the contract signed by him for the erection of such building.

Amyot v. Pageau, 53 Que. S.C. 414.

EXTRAS—UNLIQUIDATED DAMAGES.

Where a proprietor, derogating from article 1690 C.C., stipulates with a contractor regarding any sum to be paid for extras as to "any work which may be done by the contractor and not mentioned or referred to (in the devis) which may be considered as an extra, will require to be recognized either verbally or in writing by the architect or proprietor before payment can be collected for such work," it applies only to increase in the labour and materials, and does not apply to any change from the plan and specifications which remain regulated by art. 1690 C.C. Although unliquidated damages must be offered in compensation by an incidental demand, a proprietor sued by his contractor for works done, may plead directly that this latter has not executed his contract according to agreement, and that the costs of completing it should be deducted from his claim by way of compensation; doing this, he is not asking for damages.

Nutt v. Marshall, 24 Rev. Leg. 120.

BUILDING CONTRACT — EXTRAS — VARIATION — NOTICE BY CONTRACTOR — CONDITION PRECEDENT — ARCHITECT — BUILDING-OWNER — WAIVER — INDEPENDENT PIECE OF WORK NOT SUBJECT TO TERMS OF CONTRACT — REFERENCE — REPORT — APPEAL — COSTS.

Benstein v. Jacques, 15 O.W.N. 82.

BUILDING CONTRACT — EXCAVATION WORK— EXCEPTION — "ROCK" — LARGE BOULDERS ENCOUNTERED IN PROGRESS OF WORK — INCLUSION IN TERM "ROCK" — EVIDENCE — FUNCTIONS OF ARCHITECT —CLASSIFICATION OF WORK.

Mills v. Continental Bag and Paper Co., 15 O.W.N. 131.

(§ II D—194) — LUMBER CAMP — PUBLIC HEALTH ACT.

The employment under an oral contract of a duly qualified practitioner to look after the employees in a lumber camp is a sufficient compliance with Regulation 4 of sec. 118 of the Public Health Act (R.S.O. 1914, ch. 218).

Unger v. Hettler Lumber Co., 42 D.L.R. 690, 42 O.L.R. 538.

III. Validity and effect.

A. IN GENERAL.

(§ III A—195)—SALE OF LAND — PHYSICIAN AND PATIENT — CONFIDENTIAL RELATIONSHIP — INDEPENDENT ADVICE.

A medical man is placed in a position of trust and confidence towards his patient which requires from him the same degree of good faith, plain dealing, and guarded conduct which the law requires shall subsist between trustee and cestui que trust and in other relations of the same character. The rule stands upon a general principle applicable to all variety of relations in which dominion may be exercised by one person over another. And the principle applies both to gifts or voluntary conveyances and to contracts for valuable consideration, the only difference being that in the case of the latter, where the transaction is manifestly fair, evidence of independent advice may not be necessary. [Huguenin v. Baseley (1807), 14 Ves. 273, 291, 292; Rowe v. Grand Trunk R.W. Co. (1866), 16 U.C.C.P. 500, 506; Vanzant v. Coates (1917), 37 D.L.R. 471, 39 D.L.R. 485; Wright v. Carter, [1903] 1 Ch. 27, 50, 55, followed.] Where an elderly man, suffering from an incurable malady, made an agreement with his medical attendant for the sale to him of his house and land, at a price which was considered not an unfair one, and part of the purchase-money was to be paid after the patient's decease to his brother, it was held, considering the relationship of physician and patient, the condition, both mental and physical, of the deceased at the time of the agreement, the absence of independent advice, and the unfairness of the agreement in certain aspects, that the agreement must be set aside as against both the physician and the brother: as against the latter, the case was stronger, for part of the purchase-money was made a gift to him.

Ralston v. Tanner, 43 O.L.R. 77.

STOLEN GOODS—COMPROMISE.

A promise to pay a debt as soon as it "will be possible," or when the promissor's "finance will permit it," is a legal contract; it is for the Court to declare, when the debtor is sued, if he is in a condition to satisfy his obligation. A compromise effected by the seller of stolen goods with a buyer, to whom he had fraudulently sold them, does not bind the owner of the effects, who may sue this latter for the price of sale.

Orban v. Levy, 27 Que. K.B. 370.

MUNICIPAL CONTRACT—PARTIAL INVALIDITY.

If a by-law or municipal ordinance, or a contract of a municipality, can only be interpreted as a whole, the nullity of a part involves the nullity of the whole; but if, on the other hand, the stipulations are inde-

pendent one of the other, one part of a contract, or even one part of a clause of a contract, may be null and the other part legal and valid.

Compagnie Elder Ebano v. Ville de Maisonneuve, 24 Rev. de Jur. 95, 27 Que. K.B. 95.

C. Public policy.

(§ III C—260)—Hire of horses—Military officer—Liability of Crown.

A contract for the hire of horses entered into by an officer of the Crown's military forces acting under the authority of the commanding officer is binding upon the Crown.

Gulf Pulp & Paper Co. v. The King, 41 D.L.R. 508, 17 Can. Ex. 294.

D. Gambling and wager contracts.

(§ III D—272)—Brokers—Dealings in company-shares — Payments—Limitations Act.

The plaintiffs, who were stockbrokers, during the period from September, 1904, to November, 1906, bought and sold shares in various companies for the defendant. In 1904, the parties made an agreement, which applied to all existing and future transactions, and was to the effect that all moneys advanced to the defendant or paid on his account should be repayable on demand with interest; that the plaintiffs should be at liberty to hypothecate all stocks and securities deposited by the defendant with them as security for advances; that the defendant should keep a cash margin of the quoted value of the stocks as security for the account; and that, if the defendant failed to pay any indebtedness upon demand, or to keep up the margin, the plaintiffs should be at liberty, without notice, to sell all or any of the stocks or securities held by them on the defendant's account, and to apply the proceeds towards the payment of the indebtedness, holding him responsible for any deficiency. No shares were purchased after November, 1906. From that time on, the account kept by the plaintiffs consisted of debits of interest and credits of the sales of various stocks and dividends upon stocks. The account of sales was closed in May, 1913, when the plaintiffs sold some shares. The whole account shewed a balance due the plaintiffs on the 2nd May, 1913, of nearly $4,000, for which the plaintiffs sued in this action:—Held, that the transactions were not illegal by reason of the prohibition of sec. 231 of the Criminal Code or otherwise, but were real transactions, purchases and sales of shares made in good faith on behalf and at the request of the defendant. Held, also, that every payment made and credit given by the plaintiffs from the sale of shares held by them for the defendant, or payment of dividends thereon, was a payment made by the defendant upon the account as it stood when the payment was made; that each payment gave a new starting-point for the running of the Limitations Act; that there never was a time between payments when six years had elapsed; and that the Act never became effective to bar the plaintiffs' claim or any part thereof. [Chinnery v. Evans (1864), 11 H.L.C. 115; Cockburn v. Edwards (1881), 18 Ch. D. 449, referred to.]

Stark v. Somerville, 40 O.L.R. 374.

Brokers — Dealings in grain for customer—Terms on which dealings conducted — Memorandum in writing — Notice to customer — Right of brokers to sell grain when margins exhausted — Authority to purchase grain — Illegality of transactions under sec. 231 of Criminal Code — Failure to shew.

Maloof v. Bickell, 14 O.W.N. 289, affirming 13 O.W.N. 4.

E. In restraint of trade.

(§ III E—275) — Municipal contract —Monopoly—Nullity.

If a contract for public works made between a contractor and a municipality is not complete in itself, and must be interpreted as only making one with another contract creating a monopoly for an indefinite time, the transaction is void, as contrary to public order. But it is otherwise when the two contracts are distinct and can be interpreted and performed separately. So a contract by which a contractor promises to sell to a municipality which agrees to purchase from him, to the exclusion of any one else, for a year, at a fixed price, all the asphalt it will require for its streets, is not rendered illegal and void because, a month later, the municipality granted the contractor an extension of his contract for an indefinite period.

Elder-Ebano Asphalt Co. v. City of Maisonneuve, 27 Que. K.B. 95. 24 Rev. de Jur. 95.

(§ III E—285)—Restraint of trade—Reasonableness.

A perpetual injunction will be granted restraining the vendor of the stock in trade and good will of a business from carrying on a business of a similar kind in a city where, in the circumstances of the case, such restraint seems reasonably necessary to protect the interest of the purchaser and is not injurious to the public.

Mizon v. Pohoretzky, 38 D.L.R. 214, 40 O.L.R. 239; 12 O.W.N. 354, affirming 12 O.W.N. 167.

Restraint of trade — Sale of business — Covenant by vendor not to engage in business of "milk-dealer" — Action for breach — Whether sale of butter and buttermilk included—Evidence of understanding of persons in trade—Evidence of conduct of parties—Declaration of rights under agreement.

Willis v. People's Dairy Co., 15 O.W.N. 257.

IV. Performance; breach.

A. In general.

(§ IV A—315) — Delivery of company-shares — Breach — Delay — Action

BY ASSIGNEE OF PURCHASER — RIGHT TO SUE — CONVEYANCING AND LAW OF PROPERTY ACT, SEC. 49—ADDITION OF ASSIGNOR AS PLAINTIFF—READINESS TO DELIVER STOCK—DAMAGES—INTEREST—COSTS.

McTavish v. Corbet Foundry and Machine Co., 15 O.W.N. 41.

BUILDING OF SHIP—COMPLETION—DELAY—PRICE NOT FULLY PAID—DELIVERY OVER UPON PAYMENT INTO COURT OF BALANCE DUE—INJUNCTION.

Heinstein & Sons v. Polson Iron Works, 15 O.W.N. 94.

ORDER FOR GOODS — ACCEPTANCE — FAILURE TO DELIVER — REPUDIATION OF CONTRACT — SPECIFICATIONS — ELECTION — NOTICE — DAMAGES.

Perkins Electric Co. v. Electric Specialty and Supply Co., 14 O.W.N. 190, affirmed in 15 O.W.N. 352.

AGREEMENT FOR USE OF CHATTELS — LEASE —OPTION OF PURCHASE — CONSTRUCTION OF AGREEMENT—RENT OF CHATTELS—RIGHT TO RETURN OF CHATTELS—DAMAGES—INJUNCTION—COSTS.

Walt v. Wright, 14 O.W.N. 240, affirmed in 15 O.W.N. 238.

SALE OF PULPWOOD—BREACH BY VENDOR—ACTION BY PURCHASER FOR DAMAGES—DEFENCE—REPUDIATION OF CONTRACT BECAUSE OF MISREPRESENTATIONS — FAILURE OF PURCHASER TO SHEW DAMAGE—RELIEF OF PURCHASER FROM LOSS BY TRANSACTION WITH STRANGER.

New Ontario Timber Co. v. McDonald, 14 O.W.N. 261.

DELIVERY OF GRAIN — BREACH—DAMAGES.

Burford Coal and Grain Co. v. McPherson, 14 O.W.N. 283, affirmed in 15 O.W.N. 85.

(§ IV A—321)—EXTRA WORK — CONTRACT PRICE.

A contractor who has agreed to do any work ordered by the owner, "notwithstanding to what extent such increase or diminution of quantities may be carried during the performance of the work," cannot charge any additional price, if he has done the work without protest, and has accepted payment at the contract price without objection.

Vinet v. Canadian Light and Power Co., 42 D.L.R. 709, 54 Que. S.C. 134.

B. EXCUSE FOR FAILURE OF PERFORMANCE.

(§ IV B—330)—STRIKE.

Delay caused by a strike over which a party to a contract has no control, should not be counted in deciding what is a reasonable time for the performance of such contract.

Henry Hope & Sons v. Canada Foundry Co., 39 D.L.R. 308, 40 O.L.R. 338, 13 O.W.N. 35 affirming 12 O.W.N. 168.

EMBARGO—REASONABLE TIME.

If it is within the contemplation of the parties to a contract at the time the contract is entered into that an existing embargo of the railway company is of a temporary character and may be raised at any time, the vendor is not justified in repudiating the contract on the ground of impossibility of delivery until a reasonable time has elapsed; what is a reasonable time is a question of fact in view of the contemplated duration of the contract and circumstances of the case.

Brenner v. Consumers Metal Co., 41 D.L.R. 339, 41 O.L.R. 534.

IMPLIED CONDITION—CARGO SHIPS.

A vendor is released on the ground of impossibility of performance, if an implied condition in the contract, that freight space could be booked for certain deliveries, by general cargo ships in the ordinary course of transport, cannot be realised. If there is no such implied condition it must be proved that the goods could not be shipped from another port or on any tramp vessel.

Wilcox & Frost v. Lamarre, 40 D.L.R. 653, 27 Que. K.B. 265.

PROMISE TO TRUSTEES OF CHURCH—DEATH OF PROMISOR—IMPOSSIBILITY OF PERFORMANCE—CONSTRUCTIVE FRAUD.

An action by the trustees of a church against the administrator of the estate of a deceased member of the congregation to enforce an agreement made between the trustees and the member, whereby she was to make a gift of $1,000 to the church as a contribution to a fund for the erection of a parsonage and lend $1,500 to the trustees to be also expended in the erection of the parsonage, was dismissed, on the ground that her death had made the performance of the agreement, having regard to its terms and conditions and the delay of the trustees in proceeding with the building, impossible of performance; and that part of the promised money which was meant to be charity and that part which was meant to be for a consideration, could not be separated. The transaction, it was considered, was not open to attack on the ground of constructive fraud. The dismissal of the action was without costs.

Reinhart v. Burgar, 43 O.L.R. 120.

IMPOSSIBILITY OF PERFORMANCE—HAIL INSURANCE—NON-EXISTENCE.

In an action for damages for breach of a contract whereunder the defendant agreed to secure hail insurance notes "not to exceed" $50,000 in amount, which were not then in existence, but to be obtained by a firm of insurance brokers in the course of the season's business, which was just then commencing, and to hand them over to the plaintiff for collection on certain terms of remuneration in consideration of the plaintiff giving up his agency for a certain hail-insurance company, the defendant proved that the notes never came into existence and contended that, therefore, he should not be liable for

non-performance of his contract. It was held by the B.C. Court of Appeal, affirming Morrison, J., McPhillips, J.A., dissenting, that, in the view of the conduct of the parties and the peculiar circumstances in which the agreement was made, that the existence, or coming into existence of $50,000 of such notes, could not be said to be the foundation of what was to be done, and that, therefore, Taylor v. Caldwell, 3 B. & S. 826, was not applicable. The defendant appealed to the Supreme Court of Canada. Held, for the reasons given by Macdonald, C.J.A., in the Court of Appeal, 38 D.L.R. 176, that the appeal should be dismissed.

Carr v. Berg (Can.), [1918] 2 W.W.R. 368, affirming 38 D.L.R. 176, 24 B.C.R. 422.

LOAN — PENAL CLAUSE — FORCE MAJEURE.

A clause, in a loan agreement, stipulating that the principal and interest should be payable at the residence of the lender, should be understood to be the residence of the lender at the time of the contract, and not that which the creditor has at the time of the payment. 2. When the creditor transfers his debt, the place of payment is the domicile of the new creditor, if the position of the debtor is not thereby rendered more onerous. 3. If the debt is transferred to different people, the debtor is not bound to pay at the place agreed upon, even if he has consented to the transfers, because in that case the position of the debtor has become more onerous, and, in such case the debt becomes payable at the domicile of the debtor. 4. In a case where interest is to be demanded at the domicile of the debtor, the creditor must go there to make his demand for payment, otherwise the debtor is not at fault, and the creditor cannot claim the penalty attaching to his default in payment. So a loan agreement which stipulates that, upon default by the borrower to pay the interest due, the principal shall become due without demand at law, or formal demand or other method, does not dispense with the creditor making his demand for payment of interest at the place where he ought to make the payment; if he has not done so, the penalty clause cannot be enforced. 5. One who, on account of force majeure, does not fulfil an obligation to which a penalty clause is attached, is thereby freed from the penalty. 6. It is force majeure when a debtor allows to run by the delay for paying a debt without doing so, because, found wounded and senseless near his residence, he remained for a week in entire unconsciousness and inertness,, having lost his speech and memory of passing events.

Trester v. Desève, 27 Que. K.B. 237.

FORCE MAJEURE—STATE OF WAR.

War. and the disturbances which it causes in commerce, industry and transportation do not constitute a fortuitous event or irresistible force which the debtor can invoke to escape from obligations which he has contracted during the existence of such economic conditions.

Duchaine v. La Compagnie Marier et Trudel, 53 Que. S.C. 302.

FORCE MAJEURE—FLOODS.

An architect, who has hired his services at a time when the owner did not yet know the delay he was to grant for the completion of the works, cannot reasonably argue that the delay subsequently fixed is the delay which the architect and owner had in mind at the time of the agreement between them; he cannot either conclude that such delays stipulated solely for the benefit of the owner are the delays normally required for the execution of the works. No additional fee is due the architect, whatever may be the delay incurred by the contractor, if such a delay is caused by a fortuitous event, or superior force, or by a fact independent of the owner's or architect's will; the architect may only, in such a case, ask the cancellation of his contract and the value of his services to date; he cannot either ask an additional fee owing only to ordinary delays which happen in most contracts, but only in the case of delays resulting from gross neglect, and provided he himself takes against the contractor all the recourses mentioned in the contract and also that he protests the owner. River floods in the fall or spring are not, properly speaking, fortuitous events; but their intensity may sometimes cause them to be considered as such, and excuse a contractor's delays.

Surveyer v. Town of Grand'Mere, 53 Que. S.C. 357.

(§ IV B—333)—IMPOSSIBILITY OF PERFORMANCE—MACHINERY FOR MAKING SHELLS —FIXTURES.

By the terms of a written contract the plaintiffs agreed to convey in fee simple to the defendants a ten-acre plot of land together with a partially constructed building. The defendants covenanted to complete the building before a certain date, to equip the building as a factory for the manufacture of farm machinery and municipal supplies, etc., and to employ a certain number of men; on default, etc., the defendants covenanted to transfer the site and all buildings and fixtures back to the plaintiffs. There was also a proviso that it should not be deemed a breach of any of the clauses or covenants if the defendants could shew reasonable cause. By agreement between the parties, machinery was installed for making shells. The building and contents were subsequently destroyed by fire. The defendants removed some of the machinery, had it repaired and removed to another site, where they continued the manufacture of shells as before. The plaintiff alleged default and claimed specific preformance. Harvey, C.J., and Stuart, J., held that the machinery was not covered by the word "fixtures," which in the agreement meant "landlord's fixtures," Harvey, C.J., also held that reasonable cause had been shewn for not carrying on the business.

Beck, J., held that the case was not one of non-compliance with the agreement, but of an accident creating an impossibility of performance and this, by virtue of an implied condition, operated as a termination of the contract with respect to both parties to it, entitling the plaintiff, on the basis of a resulting trust, to a reconveyance of the land. Hyndman, J., held that, assuming the machinery to be fixtures within the meaning of the agreement, the permission of the plaintiffs to remove the damaged machinery operated as a waiver by them to any right to it.

Kokomo Investment Co. v. Dominion Harvester Co. (Alta)., 43 D.L.R. 198, [1918] 3 W.W.R. 366.

C. Incomplete performance; sufficiency of performance.

(§ IV C—345)—Maintenance of mother—Part performance — Statute of Frauds.

Maintenance of his mother by an illegitimate son, presumably under an oral agreement, by which she promised to devise and bequeath to him her whole estate, in return for such maintenance, is not such an act of part performance of the agreement as to take the case out of the Statute of Frauds, as it might be referable to the relationship between them. The son is, however, entitled to remuneration for the maintenance.

Noecker v. Noecker, 41 D.L.R. 138, 41 O.L.R. 296.

Part performance — Discharge of "agreement" — Laws Declaratory Act.

Sec. 2 (33) of the Laws Declaratory Act, R.S.B.C. 1911, ch. 133, which provides that part performance of an obligation extinguishes the obligation "when expressly accepted by the creditor in satisfaction or tendered in pursuance of an agreement for that purpose," does not change the law that a promise, not under seal, requires a consideration to support it, and the word "agreement" therein means a binding agreement. It seems, moreover, that in the case of a debt the part performance referred to is something other than the payment of money.

Bell v. Quagliotti (B.C.), [1918] 2 W.W.R. 915.

Architect—Work and services in erection of building — Contract — Remuneration — Work taken out of architect's hands during progress of work—Recovery on quantum meruit basis — Negligence and incompetence — Counterclaim — Dismissal — Money paid into Court — Rule 316 — Payment out on account of amount of judgment.

Gouinlock v. Maclean, 14 O.W.N. 142, varied in 15 O.W.N. 70.

Excavation work — Difficulty in completing — Work to be executed "according to plans"—Abandonment —Money expended in completion—Damages—Ascertainment of.

Penberthy v. Corner, 14 O.W.N. 275, affirmed in 15 O.W.N. 383.

Work and labour — Work not completed according to contract — Acceptance —Waiver — Costs — Deduction of sum for work not completed.

Keith v. Brown, 15 O.W.N. 255.

(§ IV C—351)—Delivery by instalments—Order or request.

A written contract should receive that construction which its language will admit and which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and greater regard should be had to the clear intent of the parties than to any particular words which they have used in the expression of that intent. The Court held that, under a contract for "1,560 bags H. Queen $2.45—delivery as required—30 bags week is to be taken out by Nov. 1st," neither party was entitled to make or have delivery otherwise than in weekly instalments, not exceeding 30 bags a week, that the time fixed for delivery and request for delivery were of the essence of the contract, that on the lapse of time fixed for each delivery there was a mutual termination of rights in reference to that delivery. The plaintiff was not entitled to ask for or receive delivery in any other manner. [Doner v. Western Canada Flour Mills Co., 41 D.L.R. 476, followed.]

Sierichs v. Hughes, 43 D.L.R. 297, 42 O.L.R. 608.

Delivery by instalments—Time—Essence of.

In a contract for the sale of flour for 1,000 bags of one kind of flour and 1,000 bags of another kind to be "Delivered as required up to Nov. 1, 35 bags week" the Court held that this must be read to mean that the flour was to be delivered as required, in instalments of about 35 bags per week, and that it was incumbent upon the purchaser to specify his requirements and accept delivery in instalments of about 35 bags a week, that if he failed to prove such specifications and requests, time and manner being of the essence of the contract, he was not entitled to ask or demand delivery at any other time or in any other manner. [Doner v. Western Canada Flour Mills Co. Ltd. (1917), 41 D.L.R. 476, 41 O.L.R. 503, followed.]

Gerow v. Hughes, 43 D.L.R. 307, 42 O.L.R. 621; 14 O.W.N. 123, reversing 13 O.W.N. 8.

Failure to meet payments when due—Set off—Delivery by instalments. Remedies of parties.

In an action brought by the surviving partner and the administrator of the estate of a deceased partner, for damages for non-delivery of the balance of goods ordered, under an agreement in writing whereby certain dealers in flour were to deliver to a firm

of bakers 5,000 bags of flour: 2,000 bags of one kind, 2,000 bags of another kind and 1,000 bags of a third kind, at a specified price per barrel for each kind; to be taken in an approximately equal monthly quantity of 410 bags per month; payments to be made in accordance with the vendors' usual terms, the purchasers' account to be kept in such condition as to warrant the usual line of credit being extended, failure to meet payments when due to give the vendor the privilege of shipping and making sight draft with bill of lading attached or refusing to make further shipments. The evidence shewed the usual terms to be the acceptance of the buyer's drafts at 30 and 45 days, with a discount for cash. The fact that a small sum was owing by the purchasers for which they had a set off and for which amount the sellers had not drawn at the time an order was given, is not a default on the part of the purchasers within the meaning of the agreement which justifies the sellers in refusing to make further deliveries. The contract being for different quantities, at different prices, of three different kinds of flour, there must be an order or request from the buyers for what they required, before the obligation to ship arose. The contract, being for delivery by instalments and for payment for each instalment separately, is to be treated as a separate contract for each instalment; the purchasers are entitled to damages for non-delivery of an instalment for which an order had been duly given, but are not entitled to call for delivery, in a subsequent month, of any instalment in respect of which no order to ship was given in due time.

Doner v. Western Canada Flour Mills Co., 41 D.L.R. 476, 41 O.L.R. 503; 13 O.W.N. 328 reversing 12 O.W.N. 301.

D. Condition; certificate of performance.

(§ IV D—360) — Extra work — Certificate of engineer.

There can be no recovery for extra work performed in connection with a contract entered into with the Crown, in the absence of an authorization and certificate of the chief engineer required by the stipulations of the contract. The Court, under sec. 48 of the Exchequer Court Act, is bound to adjudicate upon the claim in accordance with the stipulations.

Beaulieu v. The King, 17 Can. Ex. 298.

E. Breach and its effect.

(§ IV E—365)—To deliver goods—Measure of damages.

In an action for damages for breach of contract to deliver goods the measure of damage is the difference between the contract price and the price of similar goods in the open market at the time of the breach.

Lamontagne v. C. Parsons & Son, 42 D.L.R. 365, 54 Que. S.C. 297.

Brokers — Stock exchange — Sale of shares — Future delivery—Release —Assessment of damages.

The plaintiff, being the owner of certain "pooled" shares of the capital stock of a mining company, instructed the defendants who were brokers and members of an Exchange, to sell the shares at 55 or better, "seller's option 60 days or delivery 60 days." They sold them, at 60, to a broker, a member of the same Exchange; but the sale was not made upon the Exchange, and could not be recorded as an Exchange transaction. The purchaser paid for a portion of the shares and had delivery of a portion, but was in default as to the balance:—Held, that the obligation of the defendants was to make the sale on the Exchange, and subject to the rules of the Exchange. [Queensland Investment and Land Co. v. O'Connell and Palmer (1896), 12 Times L.R. 502; Forget v. Baxter, [1900] A.C. 467, 479, followed.] Upon the evidence, the plaintiff had not so adopted the defendants' action as to release whatever claim he had against them. The plaintiff was, therefore, entitled to recover whatever actual damage he could shew that he had sustained as a result of the defendants' breach of contract. Having regard to the rules of the Exchange "governing clearing-house in respect of time contracts," which would have applied if the sale has been made on the Exchange, the plaintiff's damages should be assessed at $750, being 25 per cent. of the purchase-price of the shares, the obligation of the buyer being to deliver to the manager of the clearing-house, on the third clearing day after the contract, a marked cheque for 25 per cent. of the purchase-price, for the security of the seller. That much the purchaser would doubtless have done; but what would or might have happened after that as to putting up margins or the sale of the purchaser's seat on the Exchange was too uncertain to form a basis for an assessment. Judgment was directed to be entered for the plaintiff for $750, with provisions for the benefit of the defendants, in case they succeeded in getting for the purchaser the whole or part of the balance of the purchase-price.

McMahon v. Kiely Smith & Amos, 43 O.L.R. 294.

Sale of machinery—Delivery—Damages.

Where the plaintiff company furnished, with the machinery sold to the defendant company to replace and remodel defendant company's mill, plans and blue-prints showing the lay-out of the new machines and the method of installing and arranging the same, and the defendant company, relying on the plans so furnished, constructed foundations and did other work in accordance with such plans for the purpose of installing and arranging the said new machinery whereby it suffered considerable damages by reason of such plans being defective and erroneous; Held, that the defendant company was entitled to recover such damages on its counter-claim to the plaintiff company's action for balance of the purchase-price, even

though the plaintiff company was not obliged under the terms of the written contract to furnish plans. Held, that a printed condition forming part of the contract, and providing "that retention of the property forwarded after thirty days from the date of shipment shall constitute a trial and acceptance, and be a conclusive admission of the truth of all the representations made by or for the consignor and void all contracts of warranty, express or implied," did not relieve the plaintiff company from its obligation provided in the written part of the contract to ship and deliver at a specified time, and that the defendant company's right to counterclaim for a breach was not waived by accepting and retaining the machinery (per Barry, J., in the King's Bench Division). The defendant company having sold the output of its mill for the season, of which fact the plaintiff company had knowledge before entering into the contract, bought and delivered to the purchaser of such output at his request, at an advance of fifty cents per thousand feet on the price to be paid by such purchase, 1,000,000 feet of lumber to supply an alleged shortage in output of mill caused by machinery not having been delivered according to agreement between the defendant company and plaintiff company. Held, on appeal (reversing the judgment of Barry, J., in this particular) that the defendant company was not entitled to recover on its counterclaim this advance of 50c. per thousand on this 1,000,000 feet so purchased as damages resulting from a breach of the plaintiff company's contract, where it did not appear that the defendant company was bound to deliver any specific quantity of lumber other than the actual cut of its own mill.

Berlin Machine Works v. Randolph, 45 N.B.R. 201.

BUILDING CONTRACT — BREACH — STIPULATIONS.

In a contract for the supplying and erecting of steel work for buildings and machinery a clause providing that the contractors "shall not be responsible or liable for any direct or indirect damage, loss, stoppage or delay which the purchaser may sustain, whether the said plant or machinery is specified for any particular purpose or not," held not to apply to such breaches of contract as the long-delayed shipment, delivery or erection of the steel frame contracted for. Another clause provided that "we (the contractors) would expect to make shipments of this material about the 1st April and to complete erection of the steel work in about two months after the arrival of the same at site,' held not to amount to a contract to ship' and complete the work at the dates mentioned, but only to bind the contractors to ship the material and complete the work within, in each case, a reasonable time in that behalf.

Canada Foundry Co. v. Edmonton Portland Cement Co. (P.C.), [1918] 3 W.W.R. 866, 43 D.L.R. 583, affirming 32 D.L.R. 114; 25 D.L.R. 683, 10 A.L.R. 232.

CONTRACT TO SUPPLY LUMBER — BREACH — IMPLIED TERMS — DAMAGES — PRESUMPTIONS.

If a person enters into a contract which can take effect only by the continuance of an existing state of circumstances there is an implied engagement on his part that he shall do nothing of his own motion, e.g., the selling of his assets, which will put an end to that state of circumstances. [Stirling v. Maitland, 5 B. & S. 840, at 852, followed]. In respect to damages for breach of contract, the injured party is entitled to the benefit of every reasonable presumption as to the benefit which he might have obtained had the agreement been performed. [Wilson v. Northampton and Banbury Junction R. Co., L.R. 9 Ch. 279, followed]. The plaintiff agreed to purchase and the defendant agreed to supply all the output of certain grades of lumber, "estimated at from 300,000 to 500,000 board measure per month," produced at the defendant's mill for a period of six months; after a number of deliveries and payments had been made, the mill shut down and the deliveries ceased. The defendant sold all its assets and no more lumber was supplied under the contract. Held, that evidence was inadmissible of an alleged agreement, that the plaintiffs would, as part of the consideration for the defendant's promise to supply the lumber, "finance" the defendant in connection with the contract; that it was an implied term of the contract that during the six months the defendant would continue to operate the mill and supply the lumber; that the plaintiffs were entitled in damages to the difference between the price fixed by the contract and the market price at the time of the failure to deliver the lumber, and that considering the terms of the contract and the deliveries actually made, the plaintiffs were entitled to this difference on 750,000 feet.

Morse v. Mac & Mac Cedar Co. (B.C.), [1918] 2 W.W.R. 205.

F. TIME.

See Ante, II C.

(§ IV F—370)—THRESHING — REASONABLE TIME — CAPACITY OF MACHINE FOR DAILY OUTPUT OF WORK — COMPENSATION.

Gillespie v. McKeen (Sask.), 38 D.L.R. 750.

PRINTING—DELAY—DAMAGES.

When a printer undertakes to print a catalogue and envelopes to be delivered within a fixed time, and by the fault of the other party in delaying to furnish him with copy and correcting the proofs, he can only deliver his work two months after the expiration of the time fixed, he is not liable for damages which may result therefrom, and may, in making tender of the work done, claim the price of his contract.

American Fashion Co. v. Lavesque, 24 Rev. Leg. 419.

TIME FOR PERFORMANCE NOT FIXED—TENDER—DEFAULT.

When, in a contract, each party assumed reciprocal obligations, and no time was fixed in the deed for its performance, one party cannot claim that his obligation is extinguished because the other party did not make him a tender with promptness. In order to be freed, he must himself make tender to the other of the prestation of which he is debtor, and put the other in fault by accepting and carrying out his part of the contract within the time fixed.

Lebrun v. Gruninger, 27 Que. K.B. 210.

(§ IV F—372)—BUILDING CONTRACT—WORKING DAYS — DELAY — DAMAGES—COSTS.

Where dredges or machinery are hired from the Crown by the day, only working days can be charged for. The Crown, by failing to deliver a tug, as required by the terms of the lease, cannot recover the rent therefor, but is not liable for damages to the lessee, more or less remote, by reason of delays in work occasioned thereby. 2. An offer or statement of settlement based on error is not binding and cannot operate as a judicial admission under the Quebec Civil Code. 3. The Crown cannot be held for delays occasioned by it in the performance of a building contract, where by the terms of the contract it was relieved from liability in any such event. The Court, under sec. 48 of the Exchequer Court Act, is bound to decide in accordance with the stipulations of the contract. 4. Where a party does not succeed on all the issues of an action, the Court has a discretion to deprive him of the costs. 5. The right of action having arisen in the Province of Quebec, interest upon the amount due under the contract was allowed from the date of the deposit of the petition of right with the Secretary of State.

Trudel v. The King, 42 D.L.R. 671, 18 Can. Ex. 103.

V. Change or extinguishment.

C. RESCISSION; CANCELLATION.

See Vendor and Purchaser, I E; Sale, III C.

(§ V C—402)—MISREPRESENTATION — IMPLIED CONDITION OF FITNESS.

The right to repudiate a contract for the purchase of goods on the ground of misrepresentation is a right to repudiate the contract as a whole. The purchaser cannot repudiate as to part and affirm as to part. But if through the agent of the manufacturer the purchaser makes known the purpose for which the goods are required, and if the purchaser relies on the skill of the manufacturer to furnish goods reasonably fit for that purpose, so that there is an implied condition that the goods shall be fit for the purpose, the purchaser is entitled to reject the goods if the condition is broken, and where the sale is of a number of articles each one of which must be of the kind and quality ordered, the purchaser may accept some and reject the others upon finding that they are not suitable for the purpose required. The fact that there was a breach of the condition in respect of those rejected will not support a claim for general damages. [Molling v. Dean (1901), 18 Times L.R. 217, followed; Hopkins v. Jannison (1914), 18 D.L.R. 88, 30 O.L.R. 305, referred to.]

Dominion Paper Box Co. v. Crown Tailoring Co., 43 D.L.R. 557, 42 O.L.R. 249.

TIME.

Where there has been a false representation entitling a purchaser to repudiate a contract, the repudiation need not be immediate, and natural deterioration of the article while it is retained will not disentitle to rescission. [See annotation 21 D.L.R. 329.]

Gearhart v. Kraatz, 40 D.L.R. 26, 11 S.L.R. 106, [1918] 1 W.W.R. 910.

FRAUD — SUBSCRIPTION — DELAY IN ATTACKING.

A debtor who discovers that he has been deceived in buying the stock of a company, and who is desirous to have his contract set aside, as having been obtained by fraud and false representations, must act promptly; and a delay of three years, if not explained, is not a reasonable delay.

Anson v. Stark, 24 Rev. Leg. 292.

EXCHANGE OF LANDS — MISREPRESENTATION—RESCISSION.

Hamilton v. Colloway (Alta.), 43 D.L.R. 768.

(§ V C—404)—INSANITY—KNOWLEDGE OF.

Quære, as to how far the rule, that it is necessary for a party attacking a document on the ground of insanity to prove knowledge of such insanity on the part of the person supporting it, has been affected by Daily Telegraph Newspaper Co. v. McLaughlin, [1904] A.C. 776; Molyneux v. Natal Land Co., [1905] A.C. 555.

Moore v. Confederation Life Association (B.C.), [1918] 2 W.W.R. 895.

(§ V C—407)—BREACH OF CONTRACT.

Where a party to a transaction does not fulfil the conditions of the contract, the other party has the right to demand the entire execution of the agreement and damages, but he cannot demand the cancellation of the transaction, if it be impossible to replace the parties in the same condition as they were before.

Burtner Coal Co. v. Gano Moore Co. and C.P.R., 24 Rev. Leg. 435.

TELEPHONE CONTRACT — BREACH — CANCELLATION.

A shareholder who subscribed to the capital stock of a telephone company upon the faith of a by-law guaranteeing a free telephone service "as long as the said company shall be in existence, to any shareholder owning ten shares to the amount of $500,"

is quite justified in demanding the cancellation of the contract and reimbursement of the amount of his subscription, when by reason of the disposal of a part of the system, it is impossible for the company to fulfil its agreement with him. The fact that the contract was partially fulfilled, and that the shareholder has, for 10 years, enjoyed the privilege granted, does not constitute a plea in bar in an action for cancellation of the contract.

La Compagnie de Téléphone de Kamouraska v. Houle, 27 Que. K.B. 400.

VI. Actions; liabilities.

A. In general.

(§ VI A—410) — Mixed contract — Damages — Evidence.

Art. 1235, of C.C. (Que.), which provides that "in commercial matters in which the sum of money or value in question exceeds $50 no action or exception can be maintained against any party or ties represented unless there is a writing signed by the former in the following cases: 4. Upon any contract for the sale of goods unless the buyer has accepted or received part of the goods or given something in earnest to bind the bargain," does not apply to a contract by which a contractor undertakes to furnish and place, at a fixed price, artificial stone for the construction of a wall; such contract may be proved by witnesses, since it is a mixed contract of sale and lease of labour.

Paiement v. Boisvert, 53 Que. S.C. 233.

Building contract — Action for price — Dismissal.

An action by a builder for the balance of the contract price, where the cost of doing the work over again, including loss of time, would cover the amount claimed, will be dismissed.

Bertrand v. Pepin, 24 Rev. de Jur. 232.

Construction of public highway—Agreement of land-owner to pay bonus—Construction of drain—Agreement to pay proportion of cost—Defence that work not properly done—Evidence — Counterclaim — Findings of fact of trial Judge — Costs.

Toronto and Hamilton Highway Commission v. Coleman, 14 O.W.N. 317, varied in 15 O.W.N. 389.

Services — Remuneration — Percentage — Account — Allowances — Report — Appeal.

Jackson v. McCoy, 15 O.W.N. 112.

VII. Public contracts.

See Municipal Corporations; Crown.

VIII. Wrongful interference with.

(See previous Annual Digests.)

CONTRIBUTORIES.

See Companies.

CONTRIBUTORY NEGLIGENCE.

See Negligence, II; Highways; Automobiles; Railways; Carriers; Street Railways; Master and Servant.

Findings and instructions as to, see Trial; New Trial.

CONVICTION.

See Summary Conviction; Certiorari; Habeas Corpus; Criminal Law.

COPYRIGHT.

See Trademark; Patents.

CORPORATIONS.

See Companies.

CORRUPTION.

School commissioners.

An offence committed by two school commissioners who declared themselves ready to accept a gift of $3,000 for obtaining the passing of a by-law, by the school commission of which they were members, for a claim of $9,630 due by the commission, does not come under sec. 161 of the Criminal Code, seeing that this section only contemplates municipal councillors and not school commissioners. It falls under sec. 69 of the same Code. It constitutes, also, an attempt to commit an offence such as is provided for in sec. 72 of the same Code. It is likewise an offence under the common law. If it is proved that one who made the offer of gift had no intention of paying any sum of money, the school commissioners who accepted the offer so made are rendered no less guilty of a criminal offence.

Le Roi v. Legault, 27 Que. K.B. 516.

COSTS.

I. Right to recover; liability for.
II. Taxation; practice.

Annotation.

Right of alien enemy to recover: 23 D.L.R. 375, 383.

I. Right to recover; liability for.

(§ I—1)—Trespass Act—Small Debts Court Act.

Where an action under the Trespass Act, R.S.B.C. 1911, ch. 230, is brought before a stipendiary magistrate, he can adjudicate thereon only by virtue of the powers conferred upon him by sub-sec. 1 of sec. 4 of the Small Debts Court Act, R.S.B.C. 1911, ch. 57; the Court in which he sits is the Small Debts Court and no fees or costs, other than disbursements, can be taxed against the unsuccessful party.

Farquharson v. Cortesi (B.C.), [1918] 3 W.W.R. 193.

Trespass—Payment into court—Amendment of defence.

Where in an action for trespass against a railway company the defendant made a payment into Court after defence, to the knowledge of counsel for the plaintiff, although it did not amend the defence

accordingly, but the trial Judge stated that he had intended to allow the amendment, that he thought he had done so, that leave was given at the commencement of the trial, and the trial proceeded on that assumption, and the plaintiff took chances on a decision in his favour, held that an order giving the plaintiff costs up to the leave to amend the defence had been properly made. [Per Macdonald, C.J.A., and Martin, J.A., affirming Morrison, J.]

Isitt v. Grand Trunk Pacific R. Co. (B.C.), [1918] 3 W.W.R. 500.

ACTION FOR TRESPASS BROUGHT AGAINST AGENT OF REAL TRESPASSER—JUDGMENT FOR COSTS RECOVERED AGAINST DEFENDANT—MOTION FOR ORDER FOR PAYMENT OF SUCH COSTS BY PRINCIPAL—ELECTION TO SUE AGENT—IRREVOCABILITY AFTER JUDGMENT.

Gentles v. Byrne, 14 O.W.N. 4.

(§ I—2)—DISMISSAL OF ACTION—DISCRETION.

When a defendant succeeds in his defence, and has the action dismissed, he is entitled to his costs, unless the Judge refuses them to him on the ground of special reasons. It is not sufficient for him to declare that the defendant is of a fighting disposition.

Payette v. Hébert, 54 Que. S.C. 122.

DISMISSAL OF SEPARATION ACTION.

The discretion granted to the trial Court by art. 549 C.C.P., as to the granting of costs, applies to an action for separation from bed and board; and a defendant, who succeeds in having the application made against him by his wife dismissed, will be given the costs when the use of such discretion is justified by special circumstances.

Langlois v. Gourgue, 54 Que. S.C. 330.

(§ I—2c)—APPEAL—OPPRESSIVE CONDUCT.

A respondent who simply declines to do anything to assist an appellant in his appeal is not guilty of oppressive conduct entitling the Court to deprive him of the costs of the appeal.

Thompson v. Denny, 39 D.L.R. 421, 25 B.C.R. 29, [1918] 1 W.W.R. 435.

FOREIGN COMPANY — APPEAL — SECURITY.

If a foreign person or company is brought into an action in Ontario, either by being properly served abroad, or on his application to be added as a party defendant, and after having been heard is unsuccessful and desires to appeal, the Court has power to order such person or company to give such security as will enable the resident parties to recover their costs if they succeed. The amount fixed should be sufficient only to cover the costs of the appeal.

Bailey Cobalt Mines v. Benson, 43 D.L.R. 692, 43 O.L.R. 321. [See 14 O.W.N. 174.]

EXECUTION FOR — APPEAL TO SUPREME COURT OF CANADA BY ONE PLAINTIFF—ENFORCEMENT OF EXECUTION AGAINST NON-APPEALING PLAINTIFFS — STAY UPON PAYMENT OF AMOUNT INTO COURT TO ABIDE RESULT OF APPEAL — COSTS OF APPLICATION — FORUM — JUDGE OF APPELLATE OR HIGH COURT DIVISION — SUPREME COURT ACT, R.S.C. 1906, CH. 139, SEC. 76.

Maple Leaf Lumber Co. v. Caldbick and Pierce, 14 O.W.N. 99. [See 39 O.L.R. 512.]

ACTION FOR ALIMONY — APPEAL — DISBURSEMENTS.

Whimbey v. Whimbey, 14 O.W.N. 158.

(§ I—12)—CERTIORARI—MOTION TO QUASH CONVICTION.

The fact that a defect in the first conviction was cured by an amended conviction made out and returned to a certiorari before the launching of the motion to quash, is not a ground for depriving the prosecutor of his costs of such motion. [R. v. McAnn, 3 Can. Cr. Cas. 110, 4 B.C.R. 587, distinguished.]

Rex v. Shatford, 38 D.L.R. 366, 51 N.S.R. 322, 28 Can. Cr. Cas. 284.

(§ I—14)—BONDS — LEAVE TO APPEAL — ACTION ON EXECUTION.

As a term of obtaining a stay of proceedings under a judgment, to permit applications for special leave to appeal being made to the Judicial Committee, the respondents filed bonds securing payment of the debt and costs, the obligation being void if such special leave should not be granted and the respondents should pay such damages and costs as awarded. The Court held that it was not incumbent upon the applicants to shew that they had exhausted their remedies against the respondents by execution before taking any step towards recovery upon the bonds, the leave having been refused and the debt and costs being unpaid.

Geall v. Dominion Creosoting Co.; Salter v. Dominion Creosoting Co., 43 D.L.R. 547, 57 Can. S.C.R. 226. [See Geall and Salter v. Dominion Creosoting Co., 39 D.L.R. 242].

ORDER FOR SECURITY — CONSENT — MISTAKE — SETTING ASIDE — APPLICATION FOR NEW DATE.

Knolinski v. Nelson, 40 D.L.R. 163, 13 A.L.R. 1, [1918] 1 W.W.R. 663.

SECURITY FOR COSTS — CONSOLIDATION OF ACTIONS — AMOUNT OF SECURITY.

Smith v. Township of Tisdale, 15 O.W.N. 134. [See 14 O.W.N. 111.]

SECURITY FOR — SCOPE OF PRÆCIPE ORDER —COSTS OF MOTION TO ALLOW FOREIGN COMPANY TO INTERVENE — "AND PROCEEDINGS THEREOF IN THIS ACTION" —COSTS RESULTING FROM INTERVENTION —ADDITIONAL SECURITY FOR COSTS—APPLICATION FOR—MONEY PAID INTO COURT AS SECURITY—PAYMENT OUT.

Bailey Cobalt Mines Limited v. Benson, 14 O.W.N. 33. [See 14 O.W.N. 174, 43 O.L.R. 321, 43 D.L.R. 692.

SECURITY FOR —FOREIGN PERMANENT RESIDENCE—TEMPORARY RESIDENCE IN DISTRICT FOR PURPOSE OF ENFORCING CLAIM—R. 526 (SASK.)—PRACTICE.

O'Sullivan v. Canadian Klondyke Mining Co. (Yukon), 42 D.L.R. 756, [1918] 3 W.W.R. 1.

APPLICATION FOR — SECURITY — ACTION BY FOREIGN COMPANY — COMPANY IN HANDS OF RECEIVER — SANCTION OF COURT TO INSTITUTION OF PROCEEDINGS —LIABILITY OF RECEIVER.

Franco-Belgium Investment Co. v. Dubuc (Alta.), 41 D.L.R. 711, [1918] 2 W.W.R. 684.

SECURITY — RESIDENT OUT OF PROVINCE — DISCRETION.

Rule 373 provides that security for costs may be ordered, (b) where the plaintiff is ordinarily resident out of Ontario, though he may be temporarily resident within Ontario: —Held, that when there is shewn an actual and bonâ fide change of residence from without Ontario to a place within Ontario, before the cause of action accrued, the case is not within the rule. [Kavanaugh v. Cassidy (1903), 5 O.L.R. 614, distinguished.] If there was a discretion, as said in McTavish v. Cannin and Aitchison (1917), 39 O.L.R. 445, it should be exercised, in this case, by refusing to order the plaintiff to give security.

Erickson v. McFarlane, 42 O.L.R. 32.

SECURITY FOR COSTS — PLAINTIFF OUT OF ONTARIO — COUNTERCLAIM — ONUS — DEFENDANT REGARDED AS ATTACKING PARTY.

Sutter v. Sutter, 15 O.W.N. 137.

SECURITY—TEMPORARILY RESIDENT.

Where on an application by defendant for security for costs on the ground that the plaintiff is only temporarily resident within the jurisdiction, the plaintiff's material satisfies the Judge that the plaintiff will be present at the trial, security should be refused. [Michiels v. Empire Palace, 66 L.T. 132, followed.]

De Schelking v. Zurbrick (B.C.), [1918] 3 W.W.R. 472.

SECURITY—RESIDENCE—DOMICILE.

Security for costs cannot be demanded from a plaintiff residing in the province of Quebec about twelve months, at the time of the demand for such security, although he may have his domicile in the United States.

Mathews Steamship Co. v. McCarthy, 4 Rev. Leg. 325.

SECURITY — ALIEN LEAVING FOR ARMY.

An unmarried Russian subject, who leaves the province to take up his duties as a soldier in the Russian army, will be bound to give security for costs in the suits wherein he is plaintiff.

Gorochowsky v. Quebec Fire Ins. Co., 19 Que. P.R. 244.

SECURITY — FOREIGN PLAINTIFF — CHANGE OF RESIDENCE.

A foreign plaintiff who has been ordered to give security judicatum solvi cannot, at the expiration of the delays granted him to do so, relieve himself of his obligation by declaring that he now resides in the province of Quebec.

Teney v. Marcil, 19 Que. P.R. 235.

SECURITY — FOREIGN PLAINTIFF — PLEADING —POWER OF ATTORNEY.

A defendant, who by way of motion required the plaintiff residing outside the province to furnish security judicatum solvi, may, within the delay fixed by law, after service of notice that such security has been furnished, plead to the merits of the action or urge preliminary exceptions, such as an application for a power of attorney. If the plaintiff, without reason, opposes such application, he should pay the costs of the dilatory exception.

Ingeniera Importadora, etc., Co. v. San Martin Mining Co., 19 Que. P.R. 436. [See 43 D.L.R. 322, 27 Que. K.B. 527.]

SECURITY—PROMPTNESS.

The duty of every party applying for security for costs is to apply promptly.

Mather & Noble v. Diamond Vale Supply Co. (B.C.), [1918] 3 W.W.R. 581.

SECURITY—DELAY.

A motion for security for costs, not being a preliminary exception, need not be made within the delay fixed by art. 164, C.C.P.

Home Loan & Mtge. Co. v. Fishman, 19 Que. P.R. 220.

SECURITY — NON-RESIDENT — DELAY IN APPLYING.

A defendant who learned long since that the plaintiff had ceased to reside in the province of Quebec, and has continued the proceedings on the merits notwithstanding his departure, is deprived of the right to ask later for security judicatum solvi.

Brander v. Reid, 19 Que. P.R. 139.

(§ I—19)—PARTY — DEPRIVED OF COSTS — JUST GROUND.

A party to an action is entitled to expect that, when a trial Judge deprives him of his primâ facie right to costs, the materials for a just ground of principle shall be made to appear in some form or other either upon the evidence or some recorded observation of the Judge.

Leonard v. Whittlesea, 43 D.L.R. 62, 13 A.L.R. 550, [1918] 3 W.W.R. 215.

EFFECT OF SATISFACTION—APPORTIONMENT.

A plaintiff who receives satisfaction from a defendant upon a point on which he is right, but who nevertheless continues his action, and also a defendant who begins by contesting and then gives in to the plaintiff's demand, both contribute to useless litigation, and should bear equally the costs of the suit.

Sénécal v. Charest, 27 Que. K.B. 133.

II. Taxation; practice.

As to solicitor's fees, see Solicitors.

(§ II—20)—DEFENCES — "CIRCUMSTANCES ENTITLING DEFENDANTS TO COSTS" — ADMINISTRATOR—WATCHING BRIEF.

This action was brought against the

administrator of the estate of the plaintiff's deceased wife for a declaration that she held certain land, which had been conveyed to her, in trust for herself and the plaintiff as joint tenants. Upon the application of the defendant administrator, three of the heirs or next of kin of the wife were added as defendants, and in their statement of defence they set up that she was the sole beneficial owner of the land at the time of her death. The administrator defended by a different solicitor and submitted its rights to the Court, taking issue with neither the plaintiff nor the added defendants. The judgment of the Court was, that the wife held the land in trust for the plaintiff and herself as joint tenants, and that the plaintiff became entitled thereto by survivorship, and that the defendants were "entitled to their costs of defence under the circumstances," that is, to be paid their costs by the plaintiff:—Held, on appeal from the ruling of a taxing officer, that the defendants were justified in severing in their defences, and were not confined to one set of costs (Rule 669), but that the costs of the administrator, after the new defendants were added, should be limited to the costs of and incident to a watching brief. Semble, that by the judgment pronounced two sets of costs were awarded, and it was not open to a Judge on appeal from taxation to review that judgment.

Fulton v. Mercantile Trust Co., 41 O.L.R. 192.

NOMINAL PLAINTIFF — INSURANCE — SUBROGATION—RULING OF TAXING OFFICER —APPEAL.

The plaintiff's automobile was injured by the negligence of the defendants' employees. The plaintiff was insured against injury by such an accident as that which occurred, and the insurance company adjusted and paid his loss. This action was brought by the insurance company, in the name of the plaintiff, to recover damages for the loss sustained, and in the action there was judgment for the plaintiff for $600 and costs:—Held, by Middleton, J., in Chambers, upon appeal from a ruling of the Senior Taxing Officer, that the insurance company, being called upon by the plaintiff to indemnify him, was by law subrogated to his rights against the wrongdoer; this was not an assignment of the right of action, for it was founded on tort and could not be assigned; it was the right of the insurer to resort to the Court and to assert, in the name of the assured, the assured's right of action against the wrongdoer; when the judgment was recovered, though in the name of the assured, it was the property of the insurer; the costs awarded were in the same way the costs of the insurer, though awarded in the name of the assured; and the rule that a party cannot tax against his opponent solicitor's fees which he is not called upon to pay, had no application. [Walker v. Gurney-Tilden Co. (1899), 19 P.R. 12; James Nelson & Sons v. Nelson Line, [1906] 2 K.B. 217, explained and distinguished.] Semble, where the insurer sues in the name of the assured, he is a nominal plaintiff, and in proper cases security for costs may be ordered; also the insurer is a person for whose benefit the action is brought, and from whom discovery may be had. An appeal by the defendants from the decision of Middleton, J., was dismissed by a Divisional Court of the Appellate Division. No opinion was expressed as to whether there was a right of appeal without leave.

Gough v. Toronto and York Radial R. Co., 42 O.L.R. 415, affirming 14 O.W.N. 154.

MOTION TO STAY EXECUTION—INTERLOCUTORY OR ORIGINATING.

A motion to stay execution upon an order of the Dominion Board of Railway Commissioners, made a rule of the Supreme Court of Ontario, while neither an interlocutory motion in an action nor an ordinary motion upon originating notice, has such analogy (rule 2) to the latter as to justify the taxation of the costs of it according to the provisions of the Tariff of Fees applicable to motions upon originating notices.

Re City of Toronto and Toronto R. Co., 42 O.L.R. 413. [See 43 D.L.R. 739, 42 O.L.R. 82.]

STAY OF EXECUTION—TERMS.

The successful party on a trial should in no event be made liable for the costs of an application for a stay of execution pending an appeal, and therefore an order staying an execution and making the costs, costs in the cause to the successful party on the appeal, was varied, and the costs were made costs in the cause to the successful party on the trial, if he succeeded on the appeal. There is no general rule in this province as to the terms that should be imposed on staying the execution pending an appeal. The terms are in the discretion of the Court or Judge making the order.

Cheeseman v. Canadian Pacific R. Co., 45 N.B.R. 191.

ACTION AGAINST RAILWAY — COMPENSATION —PLEA.

In an action against a railway company for compensation because of its encroachment on a foreshore adjoining the plaintiffs' lands and for the taking of a part of the plaintiffs' lands for railway purposes, the plaintiffs succeeded with respect to the foreshore only, and they were allowed the costs except so much thereof as related to the questions in controversy decided in favour of the defendant, the costs relating to said questions being given to the defendant. The company pleaded that, under its Act of incorporation, the plaintiffs were not entitled to compensation in respect of their foreshore rights if the terms of the Act were complied with in the construction of the railway. The trial Judge decided that the line had been constructed in accordance with the legislation, but held that the Act had not the effect of depriving the plaintiffs of their right to compensation. The defendant contended that it was entitled to the costs of proving

that it had complied with the Act. Held, that, as the defendant had failed upon the issue raised by its plea of justification, it was not entitled to the costs relating to that branch of the plea, viz., the construction of the line upon which it had succeeded.

Nelson v. Pacific Great Eastern R. Co. (B.C.), [1918] 3 W.W.R. 85. [See [1918] 1 W.W.R. 597.]

WITNESS FEES.

In deciding whether a party is entitled to the fees of witnesses who were in attendance but not called, the test, especially where there is a jury trial, is whether the witnesses were "necessary" at the time they were subpœnaed, and not whether they were "necessary" at the trial.

Endersby v. Consolidated Mining & Smelting Co. (B.C.), [1918] 3 W.W.R. 579.

DISPOSITION AT TRIAL—COSTS OF COMMISSION.

After judgment has been entered, the Superior Court has power, by virtue of marginal r. 319, to make an order disposing of costs that had been reserved for disposition at the trial but through oversight were not then disposed of, and the County Court, by virtue of sec. 11 of the County Courts Act, can invoke said rule and exercise the power so given.

Wood v. Sherman, 24 B.C.R. 376, [1918] 1 W.W.R. 177.

GARNISHMENT — PAYMENT INTO COURT — TAXATION OF COSTS — NECESSITY OF ORDER FOR.

Gwillim v. Carr & Staffen (Sask.), [1918] 2 W.W.R. 864.

QUEBEC PRACTICE—QUESTION OF LAW.

As the dispositions of the Code of Procedure concerning the "decision on a point of law when the facts are admitted," do not determine the principles on which the Court should assess the costs, rules of the common law and of art. 549 C.C.P. must apply.

Trudel v. Rhéaume, 54 Que. S.C. 292.

SUPPLEMENTARY FEE—ACTION ON LEASE.

Under art. 1152, C.C.P., an additional fee will not be granted to a third party opposant, who succeeds in reviving a lease of more than $50,000, if the amount claimed by the lessor in his action for cancellation of the lease does not justify such fee.

Duchess Amusement Co. v. Desmarteau, 20 Que. P.R. 97.

WINDING-UP ACT — APPLICATION TO REMOVE LIQUIDATOR.

An application for the removal of a liquidator appointed under the authority of R.S.C., ch. 144, should, if contested, be treated for the purpose of taxation of fees as an action of the second class.

Metro Pictures Ltd. v. McNeil, 20 Que. P.R. 228.

MOTION FOR REVISION—REASONS.

A motion to revise a bill of costs, which does not contain reasons in support of the application, will be refused. If such reasons have not been pleaded, the costs of the motion will be compensated.

Rumlos v. Sherwin, 20 Que. P.R. 147.

CLASS OF ACTION — CANCELLATION OF SUBSCRIPTION.

An action for the cancellation of a subscription for company shares, and the repayment of the first instalment, is governed, as to the taxation of costs, by the amount of the subscription the cancellation of which is asked for.

Leroy v. Davis, 19 Que. P.R. 20.

(§ II—26)—SOLICITORS—BILL FOR SERVICES RENDERED—LUMP SUM CHARGED FOR SPECIFIC ITEMS OF SERVICES—SOLICITOR'S ACT, R.S.O. 1914, CH. 159, SEC. 34—NO PROPER BILL DELIVERED—ACTION PREMATURELY BROUGHT.

Lynch-Staunton v. Somerville, 43 D.L.R. 736, 43 O.L.R. 282, reversed in 15 O.W.N. 303.

FEE FOR SOLICITOR — PER DIEM ALLOWANCE —"DAY"—SEPARATE ACTIONS.

Item 14 of the tariff of costs provides that the fee allowed to a solicitor attending the trial of an action is $20, but, "if the trial lasts more than one day, then for each additional day $20":—Held, that where the trial began at 3 p.m. on a Monday, was continued on Tuesday, and concluded before 3 p.m. on Wednesday, the allowance should be for two days only: the unit of "a day" begins at the hour when the trial begins and ends 24 hours thereafter. Held, also, that where two actions are tried together, the same solicitor appearing in both, the fee of $20 a day, fixed by the tariff, should be allowed in both actions.

Henstridge v. London Street R. Co., 42 O.L.R. 41.

ACTION AGAINST BOARD OF HEALTH — SOLICITOR FOR MUNICIPALITY — PUBLIC HEALTH ACT—MUNICIPAL ACT.

In an action against the Local Board of Health and the Medical Officer of Health of a city, the defence was undertaken by the city council and conducted by the regular solicitor for the corporation. The action being dismissed with costs, it was held, that the defence was in substance the defence of the corporation, the actual defendants being public officers representing the inhabitants and ratepayers of the city, and the costs of the defence were taxable against the plaintiffs. The Public Health Act, R.S.O. 1914, ch. 218, sec. 26, gave the council the right to appoint the solicitor to conduct the defence, and this carried with it the right to costs duly incurred in the conduct of the defence. [Re City of Berlin and the County Judge of the County of Waterloo (1914), 33 O.L.R. 73, and Rex on the prosecution of Cobham v. Archbishop of Canterbury, [1903] 1 K.B. 289, followed.] The general rule laid down in Jarvis v. Great Western R.W. Co. (1859), 8 U.C.C.P. 280, 285, that, "if the client be not liable to pay costs to his attorney he cannot

have judgment to recover those costs against the opposite party," is undoubted, but inapplicable to this case. [The application of that rule in Walker v. Gurney-Tilden Co. (1899), 19 P.R. 12, commented on.] The Municipal Act, R.S.O. 1914, ch. 192, sec. 245 (5), removes all difficulty as to the payment of the corporation-solicitor by salary.

Simpson v. Local Board of Health of Belleville, 41 O.L.R. 320. [See 33 D.L.R. 783, 38 O.L.R. 244, 39 D.L.R. 442, 40 O.L.R. 406.]

SOLICITOR—TAXATION OF BILL OF COSTS—PLACE OF REFERENCE—SOLICITORS ACT, SEC. 38 (3).

Re Solicitor, 15 O.W.N. 96.

SOLICITORS — ORDER FOR TAXATION OF ITEMISED BILL OF COSTS—LUMP SUM ALLOWED BY TAXING OFFICER—REFERENCE BACK WITH DIRECTION TO ADJUDICATE UPON EACH ITEM—NON-TARIFF ITEMS—EVIDENCE.

Re Solicitors, 15 O.W.N. 205.

COUNSEL FEES—TAXATION BETWEEN PARTY AND PARTY OF DEFENDANTS' COSTS OF SEVERAL ACTIONS STAYED TO ABIDE THE RESULT OF ANOTHER ACTION—RIGHT OF DEFENDANTS TO GIVE NOTICES AND SET ACTIONS DOWN FOR TRIAL—COUNSEL FEE ALLOWED IN EACH ACTION—QUANTUM—INTERFERENCE WITH DISCRETION OF TAXING OFFICER—SPECIAL CIRCUMSTANCES—APPEAL TO DIVISIONAL COURT FROM ORDER OF JUDGE IN CHAMBERS ON APPEAL FROM TAXATION—RIGHT TO APPEAL WITHOUT LEAVE—RULE 507 (2).

Flexlume Sign Co. Limited v. Globe Securities Co., 15 O.W.N. 208.

COUNSEL FEE—WRITTEN ARGUMENTS.

Solicitor's charges in connection with written arguments supplementing oral arguments held not to be taxable under a fiat for an increased counsel fee.

McFeeley v. B.C. Elec. R. Co. (B.C.), [1918] 3 W.W.R. 15. [See, [1918] 1 W.W.R. 339.

TABLE OF COSTS—DISCRETION OF REGISTRAR.

On a taxation of costs between party and party the registrar is not authorized to allow for services performed any amount in excess of the amount fixed by the table of costs, unless expressly authorized to do so. Sub-r. (29) of r. 27 of O. 65 only applies to costs, charges and expenses not provided for by the table of fees.

John Palmer Co. v. Palmer-McLellan Shoepack Co., 45 N.B.R. 257. [See 37 D.L.R. 201.]

LAWYER'S TARIFF—ADDITIONAL FEE—ACTION ON LEASE.

In an action claiming arrears of rent amounting to $1,750, in virtue of a lease worth $52,500, and also claiming the cancellation of that lease, an Attorney is not entitled to the additional fee of $100 under sec. 24 of the Lawyers Tariff, before the Court of King's Bench, as the principle of art. 1152, C.C.P., applies to the additional fee as to jurisdiction of the Court and the class of action.

Duchess Amusement Co. v. Desmarteau, 27 Que. K.B. 552.

ATTORNEY'S FEES—CLASS OF ACTION.

The class of an action to set a judgment aside depends on the net value of the estate of the de cujus. If two defendants appear and plead the same grounds separately, through the same Attorney, two complete bills of costs may be made. No fee is allowed Attorneys on the reinscribing of a case for hearing.

Brown v. Winterbottom, 19 Que. P.R. 162.

SOLICITOR'S FEES — INTEREST — EXPROPRIATION—RAILWAY ACT—APPEAL.

Interest upon the costs of advocates of parties in an arbitration does not run from the award, but from the service of the action brought to give effect to it, the award itself not being a judgment. An action brought by the advocates of one party to an arbitration award, by virtue of the Dominion Railway Act, for recovery of their costs, when another action, brought by the one whose land was expropriated to increase the amount of the award, but not including the costs of such advocates, is still pending in appeal, is not prematurely brought.

Pélissier v. Lachine, Jacques-Cartier & Maisonneuve R. Co., 53 Que. S.C. 172.

EXPROPRIATION—ATTORNEY'S TARIFF.

An expropriation, in which the compensation is contested, constitutes a real action, submitted to a real judicial tribunal, and the fees of attorneys who practice before it should be based after the tariff of their order. An attorney of one whose property is expropriated, who has succeeded in increasing the amount offered, has a right, in addition to the fees fixed by art. 79 of the tariff, to the fees of contestation, of enquête, and of hearing, as well as to an additional fee if the amount awarded justifies it. An attorney whose absence has been the cause of an adjournment of a sitting has no right to the fee provided by the tariff for an adjournment. There is a fee of $10 in each proceeding for the appointing or replacing of arbitrators, whether such replacement be by petition, motion or simple notice.

Provincial Light, Heat & Power Co. v. Latreille, 19 Que. P.R. 451.

ADVOCATE'S TARIFF—WORKMEN'S COMPENSATION ACT.

The plaintiff's attorney's bill of costs, in an action under the Workmen's Compensation Act, in which the judgment grants the plaintiff a certain amount and an annual rent, must be taxed as of an action of second class, even if, after the judgment, plaintiff asks the capital of the rent, which amounts to over $1,000.

Spearman v. Grand Trunk R. Co., 19 Que. P.R. 136.

ATTORNEY'S FEES — DOMINION ELECTIONS ACT.

A demand for account following a Dominion election, withdrawn before the accounting has taken place, must be considered, as to the question of fees, as a second class action after discontinuance. If there is a discontinuance after the summoning of the returning officer and after the exhibiting of the ballot boxes, the respondent's attorney is entitled to the enquête and hearing fees. A returning officer is entitled to be reimbursed his travelling expenses and to be paid for his vacations, attendances and loss of time. The criers' and messengers' fees must be included in the taxation.

Blondin v. Tremblay, 20 Que. P.R. 15.

ATTORNEY'S FEES—WINDING-UP ACT.

The contestation of an application for the winding-up of a company need not necessarily be in writing; the production of documents by the company is a sufficient defence to give its attorney who succeeds the fees of a contested case. The company's attorney who obtained the dismissal of the application for liquidation has a right to the general fee of a contested action (first class), and to the hearing fee, but not to the fee on the petition if there were no witnesses heard but only documents produced. The supplementary fee provided by art. 5 of the attorney's tariff (S.C.), is not granted upon the contestation of an application for winding-up.

Durocher v. Le Club Champêtre Canadien, 20 Que. P.R. 58.

ATTORNEY'S TARIFF—RE-SALE.

If a petition for re-sale for false bidding is refused, the attorney for the purchaser has a right only to the fee under art. 339 of the advocate's tariff.

Waxman v. Girouard, 20 Que. P.R. 43.

ATTORNEY'S TARIFF—LIQUIDATION OF PARTNERSHIP.

The attorney's fees on a petition to appoint a sequestrator to a partnership are those mentioned in the tariff for the proceedings for appointment of sequestrators.

Vincent v. Hyde, 19 Que. P.R. 107.

ATTORNEY'S TARIFF—ACTION DISMISSED.

An action dismissed on a preliminary exception should be treated, as regards attorney's fees, as a contested action.

Duggan v. Howard, 20 Que. P.R. 146.

SOLICITOR'S COSTS — PRACTICE — RULE NISI.

When costs are distraits to an attorney ad litem, the latter is a creditor of the debtor for these costs, and his client cannot issue a rule nisi against the debtor under art. 590, C.C.P., without the consent of his attorney, unless he shows that he has paid the said costs to the latter.

Normandin v. Montreal Tramways Co., 24 Rev. Leg. 56.

ATTORNEY WITHDRAWING FROM CASE.

An attorney ad litem, who asks permission to discontinue acting as such, under art. 260, C.C.P. (Que.), and Practice Rule 43 of Superior Court, cannot require his client to pay his costs before the appointment of a new attorney in the case; such right only exists in the case of revocation of the attorney's powers by his client.

Chapman v. Petry, 20 Que. P.R. 254.

CONSOLIDATION OF ACTIONS — COSTS OF MOTION.

If several actions have been consolidated for the purpose of proof and hearing, the party who succeeds has the right to tax, in each case, a fee for supplementary proof. An attorney may make a motion to consolidate in each of the cases and may tax a fee in each case.

Gallagher v. La Cité de Montreal, 20 Que. P.R. 264.

QUESTION OF LAW—FACTUMS—FEES.

If a case is submitted on factums after an inscription ex parte, by consent, as only questions of law are raised, the facts being admitted, the fees shall be those of a contested action and a hearing fee will be allowed.

Lee v. Aetna Life Ins. Co., 19 Que. P.R. 325.

(§ II—32)—TAXING OFFICER — POWERS — DISCRETION—APPEAL.

Rule 304, Rules of Court, Sask., contemplates that it is in his capacity as taxing officer, and upon a taxation that the taxing officer is to exercise the discretion vested in him by the rule; his jurisdiction is not concurrent with that of the trial Judge, and an appeal to the local master is a proper appeal.

Canadian Bank of Commerce v. Eye (Sask.), 43 D.L.R. 464, 11 S.L.R. 468, [1918] 3 W.W.R. 823.

CO-TENANCY.

DEPOSIT IN BANK TO JOINT CREDIT—SURVIVORSHIP—WILL.

The plaintiff's father made a deposit of money in a bank, and he and the plaintiff signed a memorandum, addressed to the manager of the bank, saying that they thereby agreed jointly and severally with the bank and each with the other that any moneys which might from time to time be placed to the credit of their joint names and the interest thereon should be subject to withdrawal by either of them, and that the death of one should not affect the right of the survivor to withdraw such moneys and interest; and each of them irrevocably authorized the bank to pay any such moneys and interest to either of them and to the survivor. The money deposited was entirely that of the father, who died shortly afterwards. In an action against the executors and a legatee under the father's will for a declaration of the plaintiff's right to the money, evidence as to the intention of the testator was admitted, and some of it shewed an intention to benefit the plaintiff. The father, by his will, which was made two

months after the signing of the memorandum, bequeathed $300 to the plaintiff, and made no mention of the deposit.
Smith v. Gosnell, 43 O.L.R. 123.

COUNCIL.

See Municipal Corporations.
Qualification of members, see Elections; Officers.

COUNTERCLAIM.

See Set-off and Counterclaim; Pleading.

COUNTIES.

See Municipal Corporations.
County Court, see Courts.

COURSE OF EMPLOYMENT.

See Master and Servant.

COURTS.

I. Jurisdiction and powers in general.
A. In general; inherent powers.
B. Over non-residents; territorial limitations.
C. Relation to other departments of government.
D. Jurisdiction over associations, etc.; conclusiveness of decisions of their tribunals.
E. Legislative power as to.
F. Power of municipality over.
G. Loss of jurisdiction.
II. Provincial Courts.
A. Jurisdiction.
B. Terms; place of sitting.
C. Transfer of cause.
D. Opinions.
III. Federal Courts.
A. Suits by or against government or government officers.
B. Suits against Crown.
C. Federal questions.
D. As dependent on citizenship.
E. As dependent on amount.
F. In equity; following provincial practice; effect of provincial laws.
G. Ancillary jurisdiction.
H. Crimes.
I. Districts.
J. Transfers between districts or Courts.
IV. Conflict of authority; relation of Province to Dominion.
A. Exclusiveness of jurisdiction first acquired.
B. Interference with other Courts; injunction.
C. Property in custody of Courts or officers.
D. When provincial or Dominion jurisdiction exclusive; limitations upon.
V. Rules of decision.
A. In general.
B. Stare decisis; previous decisions of same Court.
C. Construction and constitutionality of statutes or ordinances.
D. Provincial Courts following federal decisions.
E. Following decisions of Courts of other province or country.
F. Federal Courts following provincial decisions.

Annotations.

Judicial discretion; appeals from discretionary orders: 3 D.L.R. 778.
Jurisdiction; criminal information: 8 D.L.R. 571.
Jurisdiction as to foreclosure under land titles registration: 14 D.L.R. 301.
Jurisdiction as to injunction; fusion of law and equity as related thereto: 14 D.L.R. 460.
Jurisdiction; power to grant foreign commission: 13 D.L.R. 338.
Jurisdiction; "view" in criminal case: 10 D.L.R. 97.
Power of legislature to confer authority on Masters: 24 D.L.R. 22.
Constitutional powers as to creation of Courts and appointments thereon; justices of peace: 37 D.L.R. 183.

I. Jurisdiction and powers in general.

A. In general; inherent powers.

Jurisdiction of Prize Court, see Prize Court.

(§ I A—1)—Seaman—Action for wages—Exchequer Court.

An action by a seaman for the recovery of wages under $200 may be brought in the Exchequer Court under sec. 191 of the Canada Shipping Act, where the owner of the ship is insolvent or where neither the owner nor the master resides within 20 miles of the place where the seaman is discharged or put ashore.
Young v. The Ship "Minnie A," (Ex.), 40 D.L.R. 408.

(§ I A—4)—Substitute judge—"Absence or inability to act."

A statute which enables a certain magistrate to hold the Court of sessions only in case of the "absence or inability to act" of the sessions Judge (R.S. Que., art. 3262 (a)) implies that "absence" may mean something different from "inability to act"; "absence" connotes physical non-presence from whatever cause, and it is to be presumed that the absence was due to some good and sufficient reason. The jurisdiction of the magistrate acting in substitution for the sessions Judge is sufficiently established if it appears that when the trial began the sessions Judge was not in the Court room; such jurisdiction would not be displaced by the sessions Judge casually entering the Court room with no intention of intervening in a trial which had already been commenced by the magistrate in his capacity as a substitute Judge, particularly where the substitution had been arranged by and took place with the concurrence of the Judge himself. [Bingham v. Chabot, 3 Dal. (U.S.) 19; Byrne v. Arnold, 24 N.B.R. 161; R. v. Parkin, 7 Q.B. 165, and Ex parte Cormier, 17 Can. Cr. Cas. 179, referred to.]

Brunet v. The King, 42 D.L.R. 405, (annotated) 57 Can. S.C.R. 83, 30 Can. Cr. Cas. 16, affirming 27 Que. K.B. 481. [See also 30 Can. Cr. Cas. 9.]

B. Over non-residents; territorial limitations.

(§ I B—10)—Claim against receiver.

A plaintiff who is asserting a claim to effects and property in the possession of a liquidator should apply by summary petition to the Court of which such liquidator is an officer. No other Court has any jurisdiction to try an action, suit, attachment or seizure against such liquidator in his capacity of liquidator.

Girard v. Duhamel and C.P.R. Co., 42 D.L.R. 558, 54 Que. S.C. 367.

(§ I B—25) — Sale of land — Rescission— Powers of master.

Upon an application for cancellation of an agreement for sale of land, the applicant is entitled to such judgment as the material presented by him shews him to be entitled to. The Master has no authority to postpone or adjourn the application upon payment of a less sum than the applicant was legally entitled to.

Simmons v. Sheffield, 39 D.L.R. 454, 13 A.L.R. 351, [1918] 1 W.W.R. 633.

II. Provincial Courts.

A. Jurisdiction.

(§ II A—150)—Of prothonotary—Opposition to judgment.

Under art. 33, C.C.P. (Que.), when a judge is unable for any reason to discharge his duties at the chief place of the district, the prothonotary may perform his duties in cases of evident necessity, or when, by reason of delay, a right might otherwise be lost or endangered. Art. 70, C.C.P., as amended by 1 Geo. V. ch. 43, extends the jurisdiction of a judge to the prothonotary in the matters contained in the articles which it enumerates, although the articles relating to the opposition to judgment are not included in the enumeration; nevertheless art. 70 gives the prothonotary jurisdiction concurrent with that of the judge in certain cases, but it does not take away from him what art. 33 gives him in all cases of urgent necessity when the judge is absent, ill, or otherwise prevented from performing his duties. This jurisdiction is not concurrent, as is that of art. 70. It can be exercised only in the absence of the judge and it extends to all matters which are within the jurisdiction of a judge in chambers.

Lemieux v. Crepeau, 24 Rev. de Jur. 85.

Hypothecary action—School taxes.

In the chief place of each district, the Circuit Court has no jurisdiction to hear an action in declaration of hypothec in which the plaintiff prays for the abandonment of the property. It does not matter whether the amount originally due was due for school taxes and was less than $100. The Circuit Court of the district of Montreal has no jurisdiction to hear actions in declaration of hypothec which are appealable.

School Commissioners of Parish of La Prairie v. Westwark Realty Co., 19 Que. P.R. 164.

(§ II A—151)—Jurisdiction of District Court—Amount.

A contract to pay whatever price is being paid at a certain place or to pay the market price for goods sold furnishes the means of ascertaining the amount due and an action for that price is an action for debt. If the amount does not exceed $100, the action may be tried in the District Court under rule 4 of the District Court Rules (Sask.).

Heffer v. Kokatt, 42 D.L.R. 322, 11 S.L.R. 251, [1918] 2 W.W.R. 996.

(§ II A—155) — Certiorari — Power of appellate court to review.

The appellate court has power to review upon certiorari after judgment the proceedings of an inferior court of civil jurisdiction, not a court of record, where the proceedings are summary in their nature, notwithstanding the existence of a right of appeal. [Re Lawler and City of Edmonton, 20 D.L.R. 710, referred to. See annotation 3 D.L.R. 778.]

Dierks v. Altermatt, 39 D.L.R. 509, 13 A.L.R. 216, [1918] 1 W.W.R. 719.

(§ II A—160)—Division Courts — Jurisdiction — Claim for $96 for conversion of goods — Division Courts Act, sec. 62 (1)—Prohibition.

Re Glass v. Glass, 15 O.W.N. 194.

Jurisdictional amount — Expropriation award — Action to set aside.

An action for setting aside a decision of assessors awarding a certain indemnity for land expropriated for the purpose of building a county road, as also a third party's opposition against the judgment maintaining such an action, is governed, as far as its class is concerned, by the amount awarded by the decision attacked.

Cournoyer v. La Corporation du Comté de Richelieu, 19 Que. P.R. 165.

Jurisdictional amount — Cancellation of lease—Damages.

An action to have a lease for $624 cancelled, and for $50 damages, is not within the jurisdiction of the Superior Court, and will be referred by the Court, of its own motion, to the Circuit Court.

Saba v. Duchow, 54 Que. S.C. 53.

(§ II A—171)—King's Bench Act—Parties —Trustee.

Under rule 220 (2) and sec. 25 (k) of the King's Bench Act the Court has power to add a party defendant at the request of a defendant trustee, who is willing to render an account of his dealings with the property but who does not know to whom the accounting should be made, where that is the real issue to be tried.

Hamelin v. Newton, 39 D.L.R. 706, 28

Man. L.R. 458, [1918] 1 W.W.R. 804, reversing 38 D.L.R. 743.

B. Terms; place of sitting.

(§ II B—180) — Local master — Mortgage — Jurisdiction.

The local master has no jurisdiction to determine whether or not a mortgage is void under sec. 40 of the Assignments Act, R.S.S. ch. 142. An action must be brought in Court to set aside the mortgage.

Re Union Supply Co. Caveat, 40 D.L.R. 282, 11 S.L.R. 157, [1918] 2 W.W.R. 305.

C. Transfer of cause.

(§ II C—185) — County Courts Act — Appeal — "If it appear to judge."

In sec. 72 of the County Courts Act, R.S.B.C. 1911, ch. 53, which provides that "if during the progress of any action, cause or matter it shall be made to appear to the judge that the subject-matter exceeds in amount the limit of the jurisdiction of the County Court, he shall direct the said action, cause or matter to be transferred to the Supreme Court" the words "if . . . it shall be made to appear to the judge" mean "if it appears to the judge" or "if it appears." Therefore, the lack of jurisdiction may "appear" so as to necessitate the transfer to the Supreme Court, even though the absence of jurisdiction escapes at the time the attention of the judge and counsel (per Martin and McPhillips, JJ.A.). Where on an appeal from a County Court Judge it appears that the case is one which should have been transferred, under sec. 72 of the County Courts Act, R.S.B.C. 1911, ch. 53, to the Supreme Court, the Court of Appeal should order the transfer, rather than dismiss the action.

Giannini v. Cooper (B.C.), [1918] 3 W.W.R. 642.

Action — Counterclaim — Transfer to Supreme Court — Costs — "Good cause."

An action for damages brought in the County Court in which the defendant counterclaimed, was, at the instance of the defendant, transferred to the Supreme Court under sec. 34 of the County Court Act. The trial Judge gave judgment for the plaintiff for $40 and dismissed the counterclaim, allowing the plaintiff costs on the County Court scale in the action but no costs on the counterclaim. Held, on appeal, that in a case of both claim and counterclaim the trial Judge must decide the question of "good cause" in each. In the case of the action there was jurisdiction, and the exercise of his discretion is not subject to review, but on the counterclaim there were no facts upon which he could found a decision that there was "good cause" for depriving the plaintiff of his costs to which he is entitled on the Supreme Court scale (Galliher, J.A., dissenting in part).

Abbott v. Gold Seal Liquor Co., 24 B.C.R. 245.

Substitution of parties—Evocation.

The Circuit Court, seised of an action directed against school corporations, is competent to decide if the action commenced against them may be continued by a third corporation, praying to be substituted in their place. The case may be carried to the Superior Court, if the judgment touches the existence of the defendants and future rights which may arise.

Deschatelets v. Les Commissaires d'Ecoles Sault au Recollet, 20 Que. P.R. 108.

Action on note.

In an action upon a note, brought in the Circuit Court, where the defendant pleads that the note was given in partial execution of a promise to purchase, which he seeks to avoid, as well as the note itself, the plaintiff may transfer the action to the Superior Court.

Economic Realty Co. v. Ellis, 19 Que. P.R. 28.

III. Federal Courts.

(§ III—195) — Emphyteutic lease — Supreme Court Act.

Under clause (B), sec. 46, of the Supreme Court Act (R.S.C. 1906, ch. 139) the Court has jurisdiction to determine the proprietorship of land held under an emphyteutic lease.

City of Quebec v. Lampson, 40 D.L.R. 522, 56 Can. S.C.R. 288, reversing 49 Que. S.C. 307.

IV. Conflict of authority; relation of Province to Dominion.

(See previous Annual Digests.)

V. Rules of decision.

B. Stare decisis; previous decisions of same court.

(§ V B—295)—Stare decisis — Dicta.

Dicta are not of binding authority unless they can be shewn to express a legal proposition which is a necessary step to the judgment pronounced by the Court in the case wherein the dicta are found (per McPhillips, J.A., quoting Davidson & Co. v. Officer, [1918] A.C. 304.)

Michigan Trust Co. v. Canadian Puget Sound Lumber Co. (B.C.), [1918] 3 W.W.R. 273.

Stare decisis — Nisi prius decisions.

One judge is not bound by the decision of another judge on a point of law at nisi prius: [Forster v. Baker, [1910] 2 K.B. 636 at 638.]

Rur. Mun. of Bratts Lake v. Hudson's Bay Co. (Sask.), [1918] 2 W.W.R. 962, 11 S.L.R. 357, affirmed 44 D.L.R. 445.

D. Provincial Courts following Federal decisions.

(§ V D—310)—Rule of Canadian precedent.

The law as declared by the Supreme Court of Canada is the law of Canada until otherwise determined by higher authority.

City of Toronto v. Morson, 38 D.L.R. 224, 40 O.L.R. 227, affirming 11 O.W.N. 195. [See 28 D.L.R. 188, 37 O.L.R. 369.]

COVENANTS AND CONDITIONS.

See Contracts; Deeds; Landlord and

Tenant; Vendor and Purchaser; Mortgage; Land Titles.

(§ III C—35) — PARTY TO DEED NOT SIGNING—RIGHTS AND LIABILITIES.

A party to a deed who has not executed it cannot enforce the provisions of the deed by action without performing or observing all the covenants and stipulations on his part; but, on the other hand, he is not liable to an action of covenant by the other party to the deed.

Hart v. Great West Securities & Trust Co., 42 D.L.R. 185, 11 S.L.R. 336, [1918] 2 W.W.R. 1061.

CREDITORS' ACTION.

See Assignment for Creditors; Fraudulent Conveyances.

CREDITORS' RELIEF ACT.

See Execution; Attachment; Garnishment; Levy and Seizure; Interpleader.

CRIMINAL LAW.

I. CRIMINAL LIABILITY.
- A. In general.
- B. Capacity to commit; irresponsibility; intent; knowledge; insanity.
- C. Attempts.
- D. Solicitation.
- E. Parties to offences.
- F. Instigation or consent, as defence.

II. PROCEDURE.
- A. In general.
- B. Protection and rights of accused generally; electing mode of trial.
- C. Warrant; commitment.
- D. Necessity of indictment, presentment or information.
- E. Concurrent proceedings.
- F. Pleading; motions; demurrer.
- G. Former jeopardy.
- H. Determining sanity of accused; proceeding with trial.

III. OFFENCES AGAINST DIFFERENT SOVEREIGNTIES.

IV. SENTENCE AND IMPRISONMENT.
- A. In general.
- B. Cruel and unusual punishment.
- C. Extent of punishment generally; excessive fines.
- D. Time of imprisonment; cumulative and indeterminate sentences.
- E. Place of imprisonment.
- F. Punishment of second offences and habitual criminals.
- G. Suspension or stay of sentence; time of imposing.
- H. Parole; reprieve; pardon; ticket of leave.

V. RECORD.

VI. REMOVAL FOR TRIAL.

Annotations.

Criminal trial; continuance and adjournment; Criminal Code, 1906, sec. 901; 18 D.L.R. 223.

Cr. Code (Can.); granting a "view"; effect as evidence in the case: 10 D.L.R. 97.

Insanity as a defence; irresistible impulse; knowledge of wrong: 1 D.L.R. 287.

Trial; Judge's charge; misdirection as a "substantial wrong"; Criminal Code (Can. 1906, sec. 1019): 1 D.L.R. 103.

Leave for proceedings by criminal information: 8 D.L.R. 571.

Orders for further detention on quashing convictions; Cr. Code, sec. 1120: 25 D.L.R. 649.

What are criminal attempts: 25 D.L.R. 8.

Summary proceedings for obstructing peace officers: 27 D.L.R. 46.

Appeal: who may appeal as party aggrieved: 27 D.L.R. 645.

Pre-requisites on appeal from summary convictions: 28 D.L.R. 153.

Master's liability under penal laws for servants' acts or defaults: 31 D.L.R. 233.

False pretences; Crim. Code, sec. 404: 34 D.L.R. 521.

Prosecution for same offence after conviction or commitment quashed on certiorari: 37 D.L.R. 126.

Commutation of death sentences: 36 D.L.R. 538.

Amendment of summary convictions: 41 D.L.R. 53.

I. Criminal liability.

A. IN GENERAL.

See Assault; Disorderly House; Gaming; Obstructing Justice; Escape; Perjury; Forgery; Intoxicating Liquors.

(§ I A—1)—THEFT.

To be guilty of theft under sec. 355 of the Criminal Code, the accused must have received money or valuable security or other things on terms requiring him to hand over the thing received or the proceeds thereof to some person other than the person from whom he received it, and have fraudulently converted it to his own use.

The King v. Fraser, 40 D.L.R. 691, 11 S.L.R. 209, 30 Can. Cr. Cas. 70, [1918] 2 W.W.R. 324.

HAVING IN POSSESSION MINERAL ORE SUSPECTED TO HAVE BEEN STOLEN—GROUND FOR SUSPICION—EVIDENCE—POSSESSION —LEAVE TO APPEAL—QUESTION OF LAW —VALUE OF ORE.

Sec. 424A. of the Criminal Code (added to the Code by sec. 1 of 9 & 10 Edw. VII. ch. 12) puts upon a person, under reasonable grounds of suspicion of having stolen any of the valuable metals mentioned in the section, or having dealt with them contrary to the provisions of sec. 424 (b) or (c), the onus of proof of the "right to the possession of the same" (sec. 424A.). Being unable or refusing to account or prove a right to possession, before apprehension, is not an essential element of the crime; being unable or refusing, before conviction, is. A motion for leave to appeal from a conviction of the defendant by a District Court Judge in his Criminal Court, for that he, the defendant, "did knowingly have in his possession a

quantity of silver and gold ore of value of not less than twenty-five cents per pound which there is reasonable ground to suspect has been stolen or dealt with contrary to paragraph (b) or (c) of section 424 of the Criminal Code," and the defendant "is unable or refuses to account satisfactorily for or prove his right to the possession of the same" (these being the concluding words of the first paragraph of sec. 424A.), was refused. Held, that the one question of law upon which the defendant was in a position to ask for leave to appeal, under secs. 1014 and 1015 of the Code, was that relating to the meaning and effect of the concluding words of the first paragraph of sec. 424A.; and, as to that, his contention that he was not, before he was arrested, asked to account for or prove his right to the possession of ore which was concealed upon his person or contained in his travelling bag, and so could not be found guilty of the new offence created by sec. 424A., was answered by the finding of the District Court Judge, upon evidence upon which reasonable men might so find, that the provisions of the section had been complied with; and so the conviction would stand even if the contention as to the requirement of the section was right. Held, also, that there was, in the circumstances of the case, sufficient evidence of such reasonable ground of suspicion as sec. 424A. required; and that the proof of the value of the ore—that it was more than so much—was sufficient, though evidence of its actual value would have been better.

Rex v. Karp, 41 O.L.R. 540, 30 Can. Cr. Cas. 115.

(§ I A—3)—Intent to defraud—Inference.

Intent to defraud may be predicated from obtaining securities in a cash transaction between brokers in return for a worthless cheque on a bank in which the accused had previously closed his account; a false representation may be by conduct alone and without any oral representation as to the value of the cheque.

State of New York v. Israelowitz, 29 Can. Cr. Cas. 323, 25 B.C.R. 143.

C. Attempts.

(§ I C—10)—Bodily harm—Intent.

An attempt to do grevious bodily harm to the other occupants of an automobile may be found from evidence of reckless driving, the question of intent or no intent being one for the jury.

Rex v. McCarthy, 29 Can. Cr. Cas. 448, 41 O.L.R. 153.

D. Solicitation.

(§ I D—15)—Counselling or procuring.

A person who counsels or procures another to commit an offence is guilty of a specific offence under sec. 69 of the Criminal Code, whether the person so counselled actually commits the offence or not.

Brousseau v. The King, 39 D.L.R. 114, 56 Can. S.C.R. 22, 29 Can. Cr. Cas. 207, affirming 26 Que. K.B. 164.

II. Procedure.

A. In general.

See Summary Convictions; Justice of the Peace; Certiorari; Costs; Evidence; Witnesses; Jury; Appeal; Habeas Corpus; Trial; New Trial.

(§ II A—30)—Committal of prisoner for trial on charge of manslaughter—Indictment for murder at assizes with consent of presiding judge—Criminal Code, secs. 872, 873—Depositions at preliminary inquiry not signed by deponents—Use made of depositions at trial—Supposed comment of crown counsel on failure of accused to testify—Explanation of—Canada Evidence Act, sec. 4 (5)—Refusal of trial judge to state case for court of appeal.

Rex v. Duncan, 15 O.W.N. 163.

Quashing conviction — Magistrate "heard" evidence.

A conviction should be quashed when it is shewn that the magistrate heard evidence bearing on the charge, otherwise than in open Court or under oath; in such a case the accused is not permitted an opportunity to make a full defence nor has the Supreme Court an opportunity, on certiorari, to peruse and consider the effect of the evidence.

Rex v. Calvin (Alta.), [1918] 2 W.W.R. 1039.

Proceedings not made clear — Quashing conviction—Costs.

An accused has the right to have the proceedings made clear to him, and if this rule be not observed and the accused be convicted, the conviction should be quashed. Where a trial before a justice of the peace has not been fairly conducted and the conviction is therefore quashed, the justice may be ordered to pay the costs of the application to quash.

Rex v. Lee Kee (Alta.), [1918] 3 W.W.R. 767.

Statement as to trial.

Sec. 827, Criminal Code, must be repeated to the accused word for word; a statement by his attorney that the accused agrees to submit to trial before the Court of Sessions is not sufficient.

Miller v. Malepart, 20 Que. P.R. 184.

(§ II A—31)—Right of Attorney-General to reply—Evidence of insanity.

Sec. 944 (3) of the Criminal Code preserves to the Attorney-General the right to reply, and whether he chooses to exercise such right or not, he is not bound to sum up for the Crown at the conclusion of the evidence, before the prisoner's counsel addresses the jury. It is not proper for the Crown to call evidence of insanity, but any evidence in possession of the Crown should be placed at the disposal of the prisoner's counsel, to be used by him if he thinks fit.

The King v. Keirstead, 42 D.L.R. 193, 30 Can. Cr. Cas. 175, 45 N.B.R. 553.

(§ II A—37) — Sufficiency of indictment —Seditious libel.

Section 852 of the Criminal Code provides that every count of an indictment shall contain, and shall be sufficient if it contain, a statement that the accused has committed some indictable offence therein specified; but this does not mean merely naming an offence as "murder" or "theft"—the offence itself must be described with reasonable certainty. So also sec. 861, which declares that no count for publishing a seditious libel shall be deemed insufficient on the ground that it does not set out the words thereof, dispenses only with the ipsissima verba—there must be substantial references to identify the words or locate the objectionable parts.

Rex v. Bainbridge, 42 D.L.R. 493, 30 Can. Cr. Cas. 214, 42 O.L.R. 203.

B. Protection and rights of accused; electing mode of trial.

(§ II B—40) — Electing speedy trial — District.

An accused person committed for trial, and who, on arraignment before a District Judge under the Speedy Trials Part of the Criminal Code, has elected to take jury trial, may be permitted to re-elect to be tried without a jury by the District Judge's Criminal Court holding speedy trials in the district in which the gaol is situated to which he was committed and is in custody, although that is a different judicial district from that in which the alleged offence was committed.

Rex v. Harrison, 41 D.L.R. 381, 10 S.L.R. 434, 29 Can. Cr. Cas. 159, [1918] 1 W.W.R. 12.

Where the offence was committed in another judicial district and the accused was there committed for trial, the Judge of another District Judge's Criminal Court taking the election of the accused to be tried without a jury may properly remand the accused for trial before the District Judge's Criminal Court of the place of the offence. [R. v. Harrison, 41 D.L.R. 381, 29 Can. Cr. Cas. 159, applied].

Rex v. Anderson and Sparks, 29 Can. Cr. Cas. 176, 10 S.L.R. 434, [1918] 1 W.W.R. 14.

(§ II B—42) — Election to speedy trial — Jurisdiction.

A bill of indictment having been preferred to the grand jury under sec. 873 of the Criminal Code, a true bill found, and the accused having pleaded, and a day for trial fixed, an accused may on that day elect speedy trial before the Court of Sessions of the Peace, under Part XVIII. of the Code.

Giroux v. The King, 39 D.L.R. 190, 56 Can. S.C.R. 63, 29 Can. Cr. Cas. 258, affirming 26 Que. K.B. 323.

(§ II B—46) — Statements by accused — Admissibility.

Statements made by an accused are admissible in evidence against him although the usual warning or caution was not given, if it is shewn that such statements were voluntarily made, and were not obtained either by fear of prejudice or hope of advantage exercised or held out by a person in authority. [Ibrahim v. The King, [1914] A.C. 599; Rex v. Voisin, [1918] 1 K.B. 531; Rex v. Spain (1917), 36 D.L.R. 522, 28 Can. Cr. Cas. 113, 27 Man. L.R. 473; Regina v. Day (1890), 20 O.R. 209, referred to. See annotation 16 D.L.R. 223.]

Rex v. Rodney, 43 D.L.R. 404, 30 Can. Cr. Cas. 259, 42 O.L.R. 645.

(§ II B—46) — Confession — Voluntary— Onus.

A confession in a criminal case must not be extracted by any sort of threat or promise, or by fear of any direct or implied promise. It must be entirely free and voluntary and the onus of establishing this rests on the prosecution.

The King v. Benjamin, 41 D.L.R. 388, 53 Que. S.C. 160.

(§ II B—49) — Election of speedy trial.

A person under an indictment preferred by leave of the Judge and against whom there has been no preliminary committal for trial may even after pleading to the indictment and obtaining a continuance be permitted, with the consent of the Crown, to elect for a speedy trial without a jury (Cr. Code, sec. 828); and if he does so he cannot attack the conviction in the speedy trial court for want of jurisdiction. The preliminary condition to jurisdiction is that the accused shall have consented to be tried and that an entry of such consent shall have been made (Cr. Code sec. 827). The procedure of committal and preliminary enquiry (Code, sec. 825) does not go to the jurisdiction. [Rex v. Walsh (Rex v. County Judges Criminal Court), 16 D.L.R. 500, 23 Can. Cr. Cas. 7, referred to.]

Rex v. Giroux, 30 Can. Cr. Cas. 101, 26 Que. K.B. 323, affirmed in 39 D.L.R. 190, 56 Can. S.C.R. 63.

Summary trial — Election for — Statement of charge.

On the arraignment of an accused on a charge which cannot be tried summarily without his consent, it is imperatively essential that every word of the statement which sec. 778 (2) of the Criminal Code requires the magistrate to make shall be read to the accused before his election.

Rex ex rel Johnson v. James (Sask.), [1918] 2 W.W.R. 994.

C. Warrant; commitment.

(§ II C—50) — Certiorari — Conviction without issue of warrant — Plea of not guilty — No objection at hearing — Waiver of objection — Sec. 1130, Criminal Code.

Rex v. Wong Joe (B.C.), [1918] 3 W.W.R 672.

F. Pleading; motions; demurrer.

(§ II F—65) — Stated case — Sec. 761, Criminal Code — Rules of Court (Alta.) — Preliminary objection.

Re Wood and Hudson's Bay Co. (Alta.), 40 D.L.R. 160, [1918] 1 W.W.R. 731.

Summary conviction — Right to change plea — Guilty or not guilty.

If the same principles apply to a trial under Part XV. of the Criminal Code as to a trial of an indictable offence before a judge and jury in a superior court, it is clear that, after judgment, it is too late to apply to change a plea of "guilty" to one of "not guilty"; [Rex v. Selbe, 9 Car. & P. 346]; and even before judgment the Court has a discretion in the matter; [Rex v. Plummer, [1902] 2 K.B. 339, at p. 349.] If such principles do not apply, the applicant is in no better position, for there is no provision in Part XV. allowing an accused to withdraw an admission as to the truth of an information and as to the absence of sufficient cause why he should not be convicted.

Rex v. O'Brien (Sask.), [1918] 3 W.W.R. 848.

(§ II F—68)—Motion to quash conviction—Charge to jury.

In a criminal trial where insanity is pleaded as a defence the jury should be told by the trial Judge in his charge that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved to their satisfaction; and that to establish a defence on the ground of insanity it must be clearly proved that at the time of the committing of the act the party accused was labouring under such a defect or reason from disease of mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong. In considering a portion of the trial Judge's charge objected to, such portion must be taken and construed in conjunction with the charge as a whole and will not be a ground for quashing the conviction if it is evident that the jury could not have understood otherwise than that the prisoner was entitled to an acquittal, if they were satisfied that he did not know the nature and quality of the act he was charged with committing and that it was wrong.

The King v. Keirstead, 42 D.L.R. 193, 30 Can. Cr. Cas. 175, 45 N.B.R. 553.

G. Former jeopardy.

(§ II G—81)—Prior conviction quashed on certiorari.

The burden of establishing a plea of autrefois convict or autrefois acquit is upon the accused; so where the quashing of a prior conviction on certiorari is relied upon as a bar to a new charge, it is error for the Judge to assume in favour of the accused that the conviction had been quashed on any particular ground of those upon which the motion to quash had been based where the grounds then set up included technical objections the allowance of which would not bar a second prosecution. [R. v. Weiss & Williams (No. 1) 21 Can. Cr. Cas. 438, 13 D.L.R. 166, R. v. Weiss & Williams (No 2) 22 Can. Cr. Cas. 42, 13 D.L.R. 633, R. v. Young Kee 28 Can. Cr. Cas. 236, and R. v. Taylor, 22 Can. Cr. Cas. 234, 15 D.L.R. 679, 7 A.L.R. 72, referred to.]

Rex v. Carver (Alta.), 29 Can. Cr. Cas. 122.

(§ II G—82)—Certificate of dismissal—Summary conviction.

Where a certificate of dismissal has been granted by the magistrate under Cr. Code sec. 730, in respect of a summary conviction matter brought before him in good faith and not collusively, the certificate until set aside is an answer to a subsequent charge laid before another magistrate for the same offence, although no evidence was given for the prosecution on the first charge and an adjournment was refused upon an erroneous view of the magistrate's power to adjourn.

Rex v. Stokes (Man.), 29 Can. Cr. Cas. 144.

III. Offences against different sovereignties.

(See previous Annual Digests.)

IV. Sentence and imprisonment.

C. Extent of punishment generally; excessive fines.

(§ IV C—117)—Excessive fine—Magistrate's consideration of evidence.

In sentencing a defendant found guilty of an offence the magistrate should not increase the severity of the sentence because he considers the defendant guilty of another offence with which he has not been charged.

Rex v. Harris, 40 D.L.R. 684, 41 O.L.R. 366, 30 Can. Cr. Cas. 13.

V. Record.

(§ V—155)—District Judge's criminal court—Court of record—Jurisdiction in certain cases—Duty to keep record of case.

Rex v. Porhorliuk (Alta.), 43 D.L.R. 767.

Affidavit of magistrate—Stolen goods—Conviction quashed.

The affidavit of the magistrate cannot be looked at by the Court in order to perfect or supplement a defective record. [Rex v. Crooks, 4 S.L.R. 335, followed.] A conviction for receiving stolen goods, knowing them to have been stolen, quashed, and accused discharged from custody.

Rex ex rel Johnson v. James (Sask.), [1918] 2 W.W.R. 994.

VI. Removal for trial.

(See previous Annual Digests.)

CROSSINGS.

See Highways; Railways; Street Railways; Automobiles.

CROWN.

I. In general.
II. Rights, powers and liabilities of.

Annotations.

The Crown as a common carrier: 35 D.L.R. 285.
The "Crown": 40 D.L.R. 366.

I. In general.

See Constitutional Law.

II. Rights, powers and liabilities of.

See Public Lands; Waters; Expropriation; Carriers; Contracts.

(§ II—20) — Negligence — Public work.

An action in tort does not lie against the Crown, except under special statutory authority, and the suppliant to succeed must bring the facts of his case within the ambit of sub-sec. (c) of sec. 20 of the Exchequer Court Act. (R.S.C. 1906, ch. 140).

Theriault v. The King, 38 D.L.R. 705, 16 Can. Ex. 253.

Negligence — Public work — Post office — Elevator.

An injury sustained in the course of repairing an elevator-switch in a post office building, the elevator not being for the use of the public, is one happening on a "public work," and having been occasioned by the negligence of a servant of the Crown acting within the scope of his employment, becomes a claim under sec. 20 of the Exchequer Court Act, for which the Crown is liable.

Keegan v. The King, 39 D.L.R. 27, 16 Can. Ex. 412.

Negligence — Public work — Canal — Flooding — Release.

An action does not lie against the Crown for an injury to land from the overflow of a government canal, "occasioned by spring floods and freshets" within the terms of a deed releasing the Crown from liability upon such contingencies; nor does it come under sec. 20 of the Exchequer Court Act (R.S.C. 1906, ch. 140), sub-sec. (a) and (b), which deals with compensation for a compulsory taking or injurious affection of land, nor under sub-sec. (c) thereof, as an injury on a "public work," the property being situated about 25 miles from the canal route, and the injury not being shewn to have resulted from the negligence of an officer or servant of the Crown acting within the scope of his duties or employment.

Hopwood v. The King, 39 D.L.R. 95, 16 Can. Ex. 419.

Injury — Prescription — Public work — Vessel on launch-ways — Negligence.

The prescription for filing a petition of right is interrupted by the deposit of the petition with the Secretary of State. An injury to an employee of the Crown, while taking a Crown vessel on launch-ways owned and operated by a company on lands leased from the Crown, is not an injury happening "on a public work" within the meaning of sec. 20 of the Exchequer Court Act, and therefore is not actionable against the Crown; the mere fact of a chain breaking is not primâ facie negligence of the Crown.

Courteau v. The King, 41 D.L.R. 415, 17 Can. Ex. 352.

Railways — Open switch — Air brakes — Fellow servant — Contributory negligence — Prescription — Interruption.

An injury to a brakeman on a train of the Intercolonial Railway, resulting from the negligence of the employees of the railway in leaving a switch open without warning, is actionable against the Crown under sec. 20 of the Exchequer Court Act. The suppliant having himself been guilty of contributory negligence in failing to have on the air brakes, as required by the rules, the doctrine of faute commune was applied and the damages assessed accordingly. The doctrine of fellow servant is not in force in the Province of Quebec. The prescription for the filing of a petition of right is interrupted by the deposit of the petition with the Secretary of State.

Dionne v. The King, 18 Can. Ex. 88.

Railways — Yard — Injury to trackman — Shunting — Appliances — Signals — Look-out.

The Crown is not responsible for the death of a trackman run over by an engine carefully backing into a yard of the Intercolonial Railway, not occasioned by the negligence of any officer or servant of the Crown in or about the operation of the railway, within the meaning of sec. 20 (f) of the Exchequer Court Act, but brought about by the negligence of the deceased in having failed to keep an especially good look-out for train signals as required by the rules. Sec. 35 of the Government Railway Act, requiring the stationing of a person in the rear of a train moving reversely, and the rules governing the running of trains, do not apply to shunting engines in a railway yard. The fact that the engine attending to the shunting had no sloping tender and no foot-board and railing was immaterial under the circumstances.

Cantin v. The King, 18 Can. Ex. 95.

CURATOR (Que.).

See Assignment for Creditors; Companies, VI.

CUSTODY.

Of children, see Divorce and Separation, VI; Infants, I.

CY-PRES.

Annotation.

How doctrine applied as to inaccurate descriptions: 8 D.L.R. 96.

DAMAGES.

I. General principles; nominal damages; preventing unnecessary amount.
II. Exemplary or punitive.
A. In general.
B. For act of servant; carrier's liability.
III. Measure of compensation.
A. On contracts.
B. For telegrams.
C. Expulsion of or failure in duty to passenger.
D. In respect to freight or baggage.
E. Torts generally; breach of promise.
F. Fraud.
G. Assault; false imprisonment; malicious prosecution; abuse of process.
H. Libel or slander.
I. Personal injuries; death.
J. Injury, taking or detention of personal property.
K. Injury to real property; nuisance.
KK. Injury to business.
L. Condemnation or depreciation in value by expropriation.
M. In injunction.
N. In trade-mark, patent, and copyright cases.
O. Mental anguish.
P. Loss of profits.
Q. Time for which recoverable; prospective.
R. Counsel fees.
S. Mitigation; reduction.
T. Aggravation.
U. Apportionment.
IV. Assessment; double or treble damages.

Annotations.

Appellate jurisdiction to reduce excessive verdict: 1 D.L.R. 386.

Architect's default on building contract; liability: 14 D.L.R. 402.

Parent's claim under fatal accidents law; Lord Campbell's Act: 15 D.L.R. 689.

Property expropriated in eminent domain proceedings, measure of compensation: 1 D.L.R. 508.

Expropriation for Dominion purposes, allowance for compulsory taking, liquor license: 27 D.L.R. 250.

I. General principles; nominal damages; preventing unnecessary amount.

Review of, see Appeal.
As ground for new trial, see New Trial.
As to interest, see Interest.

II. Exemplary or punitive.

(See previous Annual Digests.)

III. Measure of compensation.

A. On contracts.

(§ III A—40)—Sale of goods—Breach.

The measure of damages for breach of a contract for the sale of goods to be delivered on a day certain is the difference between the contract price and the market price on that day.

Tainter v. McKinnon, 39 D.L.R. 483, 13 A.L.R. 54, [1918] 1 W.W.R. 776.

Sale of goods—Damages—Ascertainment—Difference between contract-price and actual value of goods, without regard to whether whole price actually paid—Chattel mortgage—Account—Method of taking—"Protracted and vexatious litigation."

Peppiatt v. Reeder, 14 O.W.N. 278.

Sale.

The damages recoverable for breach of contract of sale are the difference between the price fixed by the contract and that of the open market, the duty of the buyer, in such case, being to act prudently and to pay the lowest price possible.

Hankin v. John Morrow Screw & Nut Co., 54 Que. S.C. 208. [Affirmed by Canada Supreme Court.]

Sale—Bonds.

Where the seller of bonds does not deliver them as agreed, the buyer who had re-sold them to a third party, and is threatened with legal proceedings, is entitled to claim, from the seller, the difference between the contract price and the market price of the bonds at the date of the breach.

Thompson v. Provincial Trust Co., 54 Que. S.C. 218.

Breach of contract to sink well—Company—Liability.

Certain officers of the defendant, a joint stock company, employed the plaintiff on behalf of the company to sink a well on terms that if water were obtained at a certain maximum or a lesser depth his remuneration would be higher than if no water were obtained. The plaintiff entered upon his employment and proceeded to a certain depth when, owing to the default of the defendant, he was compelled to discontinue. Held, that as the sinking of the well was within the powers of the defendant company, and, as its articles of association did not put it out of the power of the officers in question to enter into such a contract, the contract was binding upon the defendant. That the damages should be assessed upon the assumption that water would have been obtained at, but not before, the specified maximum depth.

McGee v. Rosetown Elec. Light & Power Co., 11 S.L.R. 68, [1918] 1 W.W.R. 552.

Building contract—Breach—Excavation of tunnel.

In an action by a contractor who was wrongfully prevented by the other party to the contract from completing the excavation of a tunnel, the work being completed by the other party, it was held the contractor was entitled to the difference between

the amount he would have received had he completed the contract and the amount it would have cost him to complete. On the assessment of damages the defendants submitted as evidence of what it would have cost the plaintiff to complete the work, the actual cost incurred by them in so completing. Held (Galliher, J.A., dissenting), that it was not the actual cost incurred by the defendants in so completing the work, but the amount the plaintiffs would have expended in carrying out the work which was the proper basis from which to ascertain the difference between the contract price and the cost of the work.

McIlwee v. Foley, 24 B.C.R. 532, [1918] 1 W.W.R. 222, referred back for further enquiry by Privy Council 44 D.L.R. 5.

(§ III A—60)—Sale of land—Agent's authority.

A memorandum of agreement for the sale of land, drawn up and executed in Alberta will, in the absence of evidence to the contrary, be presumed to refer to land in that province, although the number of the meridian is omitted from the description, especially where the vendor owns lands which answer the description. A clause in the memorandum that, "In the event of your disposing of the said land at the price above stated, I agree to pay you one dollar per acre commission," is sufficient consideration. The agent must not go beyond the authority given him, but the vendor must not unreasonably entirely refuse to negotiate.

McIntyre & Co. v. Law, 40 D.L.R. 231, 13 A.L.R. 273, [1918] 2 W.W.R. 358.

I. Personal injuries; death.

Personal injuries—Direct money-loss—Loss of earning power—Pain and suffering—Possible permanent injury—Evidence—Assessment by jury of sum large but not excessive.

Pasel v. Hamilton Street R. Co., 14 O.W.N. 209.

(§ III I—165)—Personal injuries—Pain and suffering—Loss of earnings—Expenses—Disablement for future—Indemnity—Assessment of damages by trial judge.

McIlmurray v. Toronto and York Radial R. Co., 15 O.W.N. 55.

J. Injury; taking or detention of personal property.

(§ III J—200)—Claim for use and occupation.

A claim for compensation for use and occupation, not under a contract affording a basis of compensation, is not for a debt, within the meaning of the rules of the District Courts (Sask.), as to costs, but sounds in damages.

Noble v. Lashbrook, 40 D.L.R. 93, 11 S.L.R. 98, [1918] 1 W.W.R. 918.

Action to recover possession or value of chattels—Ascertainment of value—Judgment for small sum—Costs—Counterclaim — Malicious prosecution—Assessment of damages—Set-off—Costs.

Reid v. Miller, 14 O.W.N. 91.

Trespass.

In an action for trespass to goods the fact that they cannot be made as good as they were before the trespass is not a ground for holding them worthless; in such a case, if the goods still exist, the damages to which the plaintiff is entitled are measured by the extent to which the goods have been depreciated [Dick v. East Coast R. Co., 3 Dig. Eng. Case Law, p. 2213, distinguished].

Smith v. Standard Trusts Co. (Man.), [1918] 3 W.W.R. 762.

K. Injury to real property; nuisance.

(§ III K—205)—Overholding tenant—Use and occupation—Value—Costs—Review.

Although, in principle, the punishment of a presumptuous litigant be the payment of the costs, yet a tenant who contests a legitimate demand of expulsion of the premises he occupies against the will of the landlord, must, besides paying the costs, also pay the damages resulting from such an illegal occupation; but if there be no deceit nor malice on the part of the tenant, the damages can include only that which may have been foreseen when sustained, and which directly and immediately follow the cause which has produced them, that is, the value of occupation of the premises. The Court of King's Bench will not interfere with the judgment of the trial court as to evidence fixing the value of the occupation of the premises, claimed as damages, unless a gross error or a serious injustice is evident.

Friedman v. St. Charles, 27 Que. K.B. 563.

(§ III K—206a)—Animals trespassing.

Where several animals belonging to different owners have at various times trespassed on plaintiff's land, but where the evidence does not establish that animals belonging to any other owner than the defendant did any damage to the plaintiff's grain, the court is justified in assessing the full amount of the damages against the defendant.

Pixley v. Bedford, 42 D.L.R. 560, 11 S.L.R. 345, [1918] 2 W.W.R. 1055.

(§ III K—221)—Obstruction of access to sea—Railway Act.

The obstruction of a right of access to the sea by reason of the construction of a railway is within the meaning of sec. 306 of the Railway Act, R.S.C. 1906, ch. 37, and an action for damages occasioned thereby must be brought within one year of the placing of the obstruction.

Westholme Lumber Co. v. G.T.P. R. Co., (B.C.), 41 D.L.R. 42, 25 B.C.R. 343, [1918] 2 W.W.R. 551.

(§ III K—222)—Closing up ditch—Water overflowing.

One who by artificial means causes water

to be collected on his land and discharged onto his neighbour's land thereby causing damage, is liable for the damage caused.

Messenger v. Miller (N.S.), 40 D.L.R. 35.

L. CONDEMNATION OR DEPRECIATION IN VALUE BY EXPROPRIATION.

See also Expropriation.

((§ III L—240)—TRAINING CAMP—COMPENSATION—FARM—TIMBER — VALUATION —OFFSET—USE AND OCCUPATION.

The basis of compensation for the expropriation of farm or timber lands by the Crown for training camp purposes is the market value of the property as a whole, at the date of expropriation, as shewn by the prices other farms had brought in the neighbourhood when acquired for similar purposes, the benefits derived by the owner from the use and occupation of the land after the expropriation to go as an offset against his claim for damages.

The King v. Patrick King, 41 D.L.R. 374, 17 Can. Ex. 471. [Affirmed by Supreme Court of Canada, December 11, 1916.]

(§ III L—255)—COMPENSATION FOR INJURIOUS AFFECTION.

City of Regina v. Armour and McCarthy (Sask.), 42 D.L.R. 792, [1918] 2 W.W.R. 1013. [Reversed by Supreme Court of Canada.

The owner of property injuriously affected by the building of a subway is entitled to damages under sec. 245 of the City Act (R.S.S. 1909, ch. 84) although no land has been actually taken. [City of Prince Albert v. Vachon, 27 D.L.R. 216, approved.]

City of Regina v. Armour, (Sask.), 38 D.L.R. 336, [1918] 1 W.W.R. 94.

PROPERTY INJURIOUSLY AFFECTED—PUBLIC LAVATORY.

On the review of an award fixing the damages suffered by a claimant whose property had been injuriously affected by the erection of a public lavatory on the street in front of the claimant's premises, held that the amount awarded, viz., $6,000, should be increased to $25,000 [Toronto v. J. F. Brown Co., 37 D.L.R. 532, 55 Can. S.C.R. 153, referred to].

Ripstein v. City of Winnipeg (Man.), [1918] 3 W.W.R. 965, 44 D.L.R. 60.

(§ III L — 275) — INJURIOUS AFFECTION—CHANGE OF LEVEL OF STREET.

The Crown, having substituted for a level crossing a permanent subway resulting in a material change in the level of the street, is liable to an owner for special damage to his property, but not for personal damage or loss of business.

Le Blanc v. The King, 38 D.L.R. 632, 16 Can. Ex. 219.

P. LOSS OF PROFITS.

(§ III P—330)—MESNE PROFITS—EVICTION.

Held, mesne profits include not only compensation for the use and occupation of premises, but compensation for any special loss which the plaintiff has incurred, such as wages, house rent and storage of furniture, during the period of wrongful dispossession.

Vivian v. Tizard, 11 S.L.R. 217, [1918] 2 W.W.R. 765.

LAYING UP OF SHIP.

The loss of profit resulting from the laying-up of a tug while her master and engineer were in attendance at the Wreck Commissioner's Court of Investigation, held not to be an item which should be allowed on the assessment of damages arising out of a collision between the tug and another vessel.

The Cleeve v. The Prince Rupert (Ex.), [1918] 1 W.W.R. 345.

(§ III P—340)—BREACH OF CONTRACT.

Ordinarily the measure of damages for breach of contract is the loss of profits that would have been made if the contract had been carried out; the party damaged must, however, do what is practicable to minimise the loss.

Consolidated Plate Glass Co. v. McKinnon Dash Co., 40 D.L.R. 47, 41 O.L.R. 188.

BUILDING CONTRACT—DELAY—CONCLUSIVENESS OF AWARD.

For delay in completion of a contract for the construction of a building plant, beyond what would be considered a reasonable time for performance (no time of completion being stipulated clearly in the contract) the owners of the building are entitled to claim from the contractors damages for the delay resulting in loss of profits, it being established that it was clearly within the contemplation of both parties that loss of profits would result from such delay. [Hadley v. Baxendale (1854), 9 Exch. 341, 156 E.R. 145, applied.]

Canada Foundry Co. v. Edmonton Portland Cement Co., (P.C.) 43 D.L.R. 583, [1918] 3 W.W.R. 866, affirming 32 D.L.R. 114, 25 D.L.R. 683, 10 A.L.R. 232.

(§ III P—342)—SALE—REPUDIATION — REASONABLE TIME.

The measure of damages for breach of a contract to deliver goods, by repudiating the contract before a reasonable time has elapsed, on the ground of impossibility of delivery, is the difference between the contract price and the market price at the place of delivery at the time the breach occurred.

Brenner v. Consumers Metal Co., 41 D.L.R. 339, 41 O.L.R. 534.

S. MITIGATION; REDUCTION.

(§ III S—355)—TRESPASS—EXCESSIVE DAMAGES.

In an action for trespass to land where the Court is of the opinion that the trial Judge exceeded the limit in assessing damages, the judgment with respect to the trespass complained of will be affirmed, but the damages awarded will be reduced to such amount as will, in the opinion of the Court, do full justice to the plaintiffs.

Crowell v. Nickerson, 52 N.S.R. 54.

NEGLIGENCE—EXCESSIVE VERDICT—APPEAL.

Where the plaintiff has obtained a verdict in an action for damages by reason of the defendant's negligence the Court of Appeal will not interfere on the ground of excessive damages, unless they think that, having regard to all the circumstances of the case, the damages are so large that no jury could reasonably have given them.

Panetta v. Canadian Pacific R. Co., 24 B.C.R. 249.

REDUCTION ON APPEAL.

A Court of Appeal will not reduce the amount of damages granted by the trial Court when nothing indicates that the judgment was rendered through improper motives or by error.

Larivière v. Lachapelle, 53 Que. S.C. 374.

IV. Assessment; double or treble damages.

(See previous Annual Digests.)

DEATH.

Annotations.

Parent's claim under fatal accidents law; Lord Campbell's Act: 15 D.L.R. 689.

Effect of war on recovery by alien enemy beneficiaries or dependents: 23 D.L.R. 375, 380.

(§ II B—10)—RIGHT OF ACTION—"ASCENDANT" RELATIVE—STEPMOTHER.

A stepmother is not an "ascendant" relative within the meaning of art. 1056 of the Quebec Civil Code, so as to entitle her to a right of action for the death of a stepson killed while in the discharge of his duties in a shipyard of the Crown.

Bonin v. The King, 42 D.L.R. 510, 18 Can. Ex. 150.

DECEIT.

See Fraud and Deceit.

DECREE.

See Judgment; Foreclosure decree, see Mortgage; Vendor and Purchaser.

DEEDS.

I. FORM AND REQUISITES.
- A. In general; execution.
- B. Delivery.

II. CONSTRUCTION; EFFECT; VALIDITY.
- A. In general; construction.
- B. Description of parties.
- C. Description of property conveyed.
- D. What property passes.
- E. Estate or interest created.
- F. Revocation; setting aside.
- G. Failure of consideration.

Annotations.

Construction; meaning of "half" of a lot: 2 D.L.R. 143.

Discharge of mortgage as re-conveyance: 31 D.L.R. 225.

Estates for life: 31 D.L.R. 390.

I. Form and requisites.

A. IN GENERAL; EXECUTION.

(§ I A—1)—SALE—FOREIGN DEED—REGISTRATION.

Where a deed of sale is made and signed in another province than Quebec, without the legal formalities required in the latter, which for that reason cannot be registered in Quebec, the sale between the parties will be valid, and it is the purchaser's duty to prepare a deed in accordance with the agreement, in a form which conforms with the law.

Lamothe v. Hebert, 24 Rev. Leg. 182.

AUTHENTIC DEED—NOTARY—SIGNATURE—FALSITY—RATIFICATION—EVIDENCE.

A deed, to be authentic, must be signed by all the parties before the acting notary: and if the words "have appeared before us," written in the deed by the notary, are untruthful, the deed is false and any interested party may have it declared unauthentic. A deed of ratification which does not mention the cause of nullity which it purports to rectify, and does not shew the intention of correcting that nullity, is not evidence.

Fyfe v. Birchenough, 53 Que. S.C. 466.

II. Construction; effect; validity.

A. IN GENERAL.

Tax sale deeds, see Taxes.

(§ II A—15)—"CEDE"—"TRANSFER."

All the language in a deed must be taken into consideration for the purpose of discovering the intention of the parties, and words are to be given their natural meaning unless inconsistent with other provisions in the deed; the words "cede" and "transfer" may be perfectly consistent with the intention of giving the property as a pledge and not a complete transfer.

Cuddy v. Brodeur and the Prudential Trust Co., 39 D.L.R. 134, 24 Rev. Leg. 39.

POWER OF APPOINTMENT—EXERCISE BY WILL—VALIDITY—WILLS ACT, SEC. 30—CLAIM TO DOWER—APPLICATION UNDER VENDORS AND PURCHASERS ACT—SERVICE ON DOWRESS—RULE 602—TITLE TO LAND.

Re Osborne and Campbell, 15 O.W.N. 48.

C. DESCRIPTION OF PROPERTY.

(§ II C—34)—"COAST LINE."

When a conveyance describes one of the boundaries of land as the "coast line," that boundary is to be found at high water mark.

Esquimalt & Nanaimo R. Co. v. Treat (B.C.), 43 D.L.R. 653, [1918] 3 W.W.R. 685.

D. WHAT PROPERTY PASSES.

(§ II D—35)—EASEMENTS OR PRIVILEGES—"WAY."

A deed which specifically and reasonably describes the lot, together with the buildings and all easements or privileges appertaining

thereto, includes a way in the rear of the house which need not be specifically described.
Ennis v. Bell, 40 D.L.R. 3, 52 N.S.R. 31.

(§ II D—40)—Reservations and exceptions—Easements—Registration.
Reservations in a conveyance of land of "all coal, coal oil, petroleum, etc., within, upon or under the same" are exceptions and reservations from the grant and not easements, and should not be registered as charges, a certificate of indefeasible title may issue subject to these reservations a memorandum of which should be endorsed on the certificate. The incorporeal rights, such as rights of entry and rights of way, are easements, and not subject to reservation, but if they are easements of necessity incidental to the getting of the minerals there is no need to register them as a charge.
Alberni Land Co. v. Registrar-General of Titles (B.C.), 40 D.L.R. 142 (annotated), 25 B.C.R. 273, [1918] 2 W.W.R. 537.

Reservations—Ownership.
A gift of real estate made in a marriage contract, with reservations, not fixing the time, by the donor, "of half of the maple syrup and maple sugar; of half of the apples; all the firewood," must be construed as unlimited, and the things therein mentioned as having remained among the donor's assets.
Legault v. Brisson, 53 Que. S.C. 251.

F. Revocation; setting aside.

(§ II F—65)—Voluntary conveyance—Undue influence—Onus.
If a gift be made by one who is aged and infirm, and dependent on the one to whom the gift is made, equity casts upon the donee the burden of proving that the transaction was fairly conducted, as though between strangers, and that the weaker was not unduly influenced by the stronger.
Vanzant v. Coates, 39 D.L.R. 485, 40 O.L.R. 556, affirming 37 D.L.R. 471, 39 O.L.R. 557.

Third party—Title—Heirs—Hypothec—Misrepresentation.
A private writing cannot be opposed to a third party in good faith if the latter is the heir by particular title of one of the signatories of the deed. One who has bought and paid for, in good faith, a claim resulting from an hypothecary loan, cannot be affected by an action to set aside taken by the borrower and attacking the deed of obligation as null on the ground of false representations, when that borrower has voluntarily signed the deed.
Limoges v. Jones, 53 Que. S.C. 70.

DEFAMATION.

See Libel and Slander.

DEFENCE.

See Pleading.
To action on negotiable paper, see Bills and Notes.
To liability on contract, see Contracts.
Against liability as stockholder, see Companies.
Of probable cause, see False Imprisonment; Malicious Prosecution; Arrest.
Of justification, see Libel and Slander.

DEFENDANTS.

See Parties, II.

DEFINITIONS.

See Words and Phrases.

DELIVERY.

See Bills and Notes; Carriers; Deeds; Gifts; Sale.

DEMURRER.

See Pleading, VII.

DEPOSITIONS.

See also Discovery; Evidence; Witnesses.

Annotation.
Foreign commission; taking evidence ex juris: 13 D.L.R. 338.

(§ I—2) — Commission — Discretion of court—Conditions—Action on policy—Defence of fraud.
In an action on a life-insurance policy for $2,000, wherein the defence of fraud was raised, held, on the application of the defendant, that a commission should be granted for the examination of a physician who had attended the deceased (the expense of bringing the physician to the trial, would have been, it was alleged, $700); but the Court imposed the condition that a Judge should have discretion, on application by the plaintiff before trial, to refuse to permit the depositions to be used [Peters v. Perras, 13 A.L.R. 80, referred to.]
Lang v. Northern Life Assurance Co. (Alta.), [1918] 3 W.W.R. 1016.

(§ II—5)—Commission—Witness outside of province.
The jurisdiction of the Superior Court of Quebec not extending to persons and things outside of the province, the Court has neither power nor jurisdiction to appoint a commissioner to take evidence outside of the province or to confer on him power to obtain legal and effective proof.
Vachon v. Montreal Abattoirs Ltd., 20 Que. P.R. 134.

(§ IV—17)—Of absent witness.
The admission in evidence for the Crown of the depositions of an absent witness taken on the preliminary enquiry without the proof of absence required by Cr. Code sec. 978 will not entitle the accused to a new trial where he, through his counsel, expressly requested at the trial that such depositions should be put in. [R. v. Brooks, 11 Can. Cr. Cas. 188, 11 O.L.R. 525, cited.]
Rex v. Hogue, 39 D.L.R. 99, 39 O.L.R. 427, 28 Can. Cr. Cas. 419.

DEPOT.

Establishment and maintenance of, see Carriers.

DESCENT AND DISTRIBUTION.

Succession duties, see Taxes, V.

As to devise or bequest of property, devolution of estates, see Wills; Executors and Administrators.

Annotation.

Effect of war on inheritance rights of alien enemies: 23 D.L.R. 375, 380.

(§ III—30)—Succession—Substitution—Remuneration by institute—Heirs—Conservation acts.

Those called to a substitution may, before the opening of the substitution, perform any acts necessary to conserve their rights. In the case of a universal legacy given by a testator to his brother with the obligation of preserving the property and of giving it, on his death, to his children born or to be born, and on failure of children to his nephews and nieces, if the institute renounces his universal legacy before acceptance, it is not the nephews and nieces who have the right to enjoy the proceeds and revenues on the failure of children of the institute, but the heirs ab intesta of the testator until the death of the institute, on the same conditions as the first institute. Such renunciation has had the effect of making void the universal legacy given to the brother of the testator, but not the trust which was imposed upon him. In this case, the nephews and nieces of the testator have no other rights than those which they had before the renunciation of the institute, namely, any right in being present, but only contingent rights which will be brought into being only upon the death of the first institute if he dies without children.

Robert v. Martin and Robert, 27 Que. K.B. 54.

DESCRIPTION.

See Deeds; Bills of Sale; Chattel Mortgage; Vendor and Purchaser; Specific Performance; Wills.

In policy, see Insurance.

DESERTION.

Annotation.

Desertion from military unit: 31 D.L.R. 17.

DEVISE.

See Wills.

DISCHARGE.

Of indorser, see Bills and Notes, III.

Of surety, see Principal and Surety; Guaranty, II.

On habeas corpus, see Habeas Corpus.

Of servant, see Master and Servant, I.

Of mortgage, see Mortgage.

DISCOVERY AND INSPECTION.

I. In general; of documents.
II. Physical examination.
III. Submitting person to.
IV. By interrogatories or depositions.

Annotation.

Examination and interrogatories in defamation cases: 2 D.L.R. 563.

I. In general; of documents.

See also Depositions.

(§ I—1)—Document—Ledger.

A ledger or other book of account containing accounts relating to transactions between the parties to an action and also other accounts between one of the parties and many other individuals not connected with the issues is not a "document" within the meaning of rr. 364 and 366 relating to orders for discovery and the affidavit thereon. The person making the affidavit must specify either by existing page numbers or by identification marks placed thereon specially for the purpose the particular pages wherein entries can be found relevant to the matters in issue.

Royal Bank of Canada v. Wallis, 41 D.L.R. 383, 13 A.L.R. 416, [1918] 2 W.W.R. 620.

Negotiations for settlement—Right to disclosure.

Where fraud is alleged, a party is entitled to disclosure of what took place at negotiations for settlement made "without prejudice" only where the negotiations were for the purpose of committing or furthering fraud, but not where they were innocent. When statements or admissions would, if unqualified, have been pertinent to the issue and the question of their admissibility in evidence turns on the fact that they were made "without prejudice" in negotiations for compromise, they will be ordered disclosed on discovery at the instance of a party who was not a party in the negotiations, but they may not necessarily be allowed in evidence at the trial.

Schetky & Acadia v. Cochrane, 24 B.C.R. 498, [1918] 1 W.W.R. 821.

Production of documents by stranger to action—Rule 350.

McCurdy v. Oak Tire Co., 15 O.W.N. 193.

Production of documents—Memorandum book of employee.

In an action for the recovery of the price of wheat alleged to have been delivered by the plaintiff into an elevator belonging to the defendant company held that the manager of the company must produce on examination for discovery a private memorandum book kept by the official in charge of the elevator which contained entries of the receipt of some of the grain in question. [Anderson v. Bank of British Columbia, 2 Ch. D. 644; Jones v. Great Central R. Co., [1910] A.C. 4; Pavitt v. North Metropolitan Tramways Co., 48 L.T. 730, applied.]

Campbell v. Dominion Elevator Co. (Man.), [1918] 1 W.W.R. 938.

II. Physical examination.

(See previous Annual Digests.)

III. Submitting person to.

See Evidence; Witnesses.

IV. By interrogatories or depositions.

(§ IV—20)—Plaintiff residing abroad—Place for examination—"Just and convenient."

One of the plaintiffs, in an action brought in the Supreme Court of Ontario, resided in New York, and an order was made, under rule 328, requiring him to attend in Toronto for examination for discovery at the instance of the defendants. On appeal the order was varied so as to provide for the examination taking place in New York. Ordinarily the place of residence of the person to be examined is the proper place for his examination; in this case no special circumstances were suggested; and it seemed "just and convenient" (rule 328) that the examination should take place in New York.

Duell v. Oxford Knitting Co., 42 O.L.R. 408.

Examination of defendant—Disclosure of name of person to whom printed copies of libellous document given—Re-examination of defendant—Refusal to answer—Motion to commit—Forum—Order for further attendance—Costs.

Hays v. Weiland, 14 O.W.N. 180. [See 43 D.L.R. 137, 42 O.L.R. 637, 14 O.W.N. 146.]

Examination of persons for whose benefit action defended—Rule 334.

Patterson v. Toronto General Trusts Corporation, 15 O.W.N. 42.

Right of defendant—Leave.

Until the defence has been delivered the defendant is not entitled to examine for discovery without leave.

Mitchell v. Renfrew (B.C.), [1918] 1 W.W.R. 942.

Demand of notice—Issue of damages.

An examination for discovery may be ordered in an action wherein no defence, but only a demand of notice, has been delivered, and the only issue to be determined is the amount of damages.

Bowen v. Canadian Northern R. Co. (Alta.), [1918] 1 W.W.R. 417.

Information by employee—Right to compel answers.

In an action by a purchaser to set aside an agreement for sale, held that the defendant must answer an examination for discovery certain questions in regard to information obtained by him from his employee who conducted the transaction with the plaintiff.

Burns v. Henderson (Alta.), [1918] 1 W.W.R. 885.

Duty of examinee—Information—Disclosure.

Held, that a party on examination for discovery is bound to make reasonable efforts to inform himself of all matters material to the issue, and to disclose such information.

Bondar v. Usinovitch, 11 S.L.R. 64, [1918] 1 W.W.R. 557.

Mortgage—Discovery after judgment.

Where judgment is obtained on a mortgage the mortgagor may be required under rule 634 to attend for examination, notwithstanding the fact that, because of sub-sec. 2 of sec. 62 of the Land Titles Act, execution of the judgment is stayed.

Franco Belgium Investment Co. v. McNamara (Alta.), [1918] 2 W.W.R. 929.

Examination of witness about to leave province.

A witness who is ill, or about to leave the province, may be examined any time after the service of the summons and before the return of the writ.

Forest v. Montreal Tramways Co., 19 Que. P.R. 257.

Foreman—Workmen's Compensation Act.

In an action under the Workmen's Compensation Act, the employer's foreman may be examined for discovery.

Stychlinsky v. Can. Steel Foundries, 20 Que. P.R. 131.

Examination after judgment.

A creditor has a right to interrogate his debtor from time to time as to his property, and the latter cannot escape from the order by saying that he has already been interrogated, or that other means of execution have been taken against him.

Tracey v. Pariseau, 19 Que. P.R. 18.

Examination after judgment—Illness of debtor.

An attorney for a party to an action is functus officio as soon as judgment has been given. An attorney, who appears on a rule nisi issued against his client, is not entitled to a notice, if his client is later examined under art. 590 C.C.P. An application may be made to examine, after judgment, a debtor sick at his home, without being bound to notify him of such application. Even if such examination disturbs the debtor, the creditor exercising the right is not liable for damages.

Asselin v. Ducharme, 19 Que. P.R. 374.

(§ IV—31)—Of officer—Second examination—Costs.

Under rule 279 (Sask. Rules of Practice) the defendant is entitled to examine any officer or servant of the plaintiff corporation without an order, but having examined one officer, he is not entitled to examine another without an order of the court, and will not be allowed the costs of a useless examination unless the plaintiffs have refused to furnish him with the name of the proper officer to be examined.

Canadian Bank of Commerce v. Eye (Sask.), 43 D.L.R. 464, 11 S.L.R. 468, [1918] 3 W.W.R. 823.

FORECLOSURE ACTION—AFFIDAVIT OF DEFAULT—EXAMINATION ON—PERSONAL KNOWLEDGE.

Great West Permanent Loan Co. v. McEvers (Sask.), 40 D.L.R. 755, [1918] 2 W.W.R. 396.

OFFICER OF COMPANY—INTEREST ADVERSE TO COMPANY.

A court or judge may name a new officer of a company to be examined for discovery under r. 250, substitutionally or additionally to one already selected by the company. Where, however, a company defendant had selected one of its officers for examination for discovery it was held that the Court should not grant an order for the examination of another officer in lieu of the one selected, where such other officer, who was also an individual defendant, had defended in the name of a solicitor who was not the solicitor for the company, and had made admissions in his defence which the company contended would be prejudicial to it if made by him on examination as the company's representative. [Lea v. City of Medicine Hat, 11 A.L.R. 380, 35 D.L.R. 109, and McLean v. C.P.R. (No. 1), 12 A.L.R. 61, 28 D.L.R. 550, referred to.] (Per Beck, J., Harvey, C.J., and Hyndman, J., concurring, Stuart, J., dissenting.)

Pelican Oil & Gas Co. v. Northern Alberta Natural Gas Co. (Alta.), [1918] 1 W.W.R. 957.

"OTHER OFFICER OR SERVANT" OF CORPORATION—AGENT OF INSURANCE COMPANY.

A local agent of an insurance company may be examined for discovery as an "other officer or servant" under the sub-rule 2 of r. 370 c of O. 31a.

Yamashita v. Hudson Bay Ins. Co. (B.C.), [1918] 3 W.W.R. 671.

(§ IV—32)—LIBEL—DISCLOSURE OF NAME OF AUTHOR.

On an examination for discovery in an action for libel based on a printed pamphlet, the defendant can be compelled to disclose the name of the author of the pamphlet as being a relevant fact in the case, although it involves the disclosure of the name of a witness.

Hays v. Weiland, 43 D.L.R. 137, 42 O.L.R. 637. [See 14 O.W.N. 180.]

DISCRETION.

Review on appeal, see Appeal, VII.

Mandamus to compel exercise of discretionary power, see Mandamus.

As to awarding costs, see Costs, I.

DISMISSAL AND DISCONTINUANCE.

See Pleading.

Costs on, see Costs.

DISORDERLY HOUSE.

(§ I—12)—RIGHT TO SEARCH—ARREST—EXAMINATION OF PERSONS.

Section 641 of the Criminal Code as amended in 1913 (Dom. stats. 1913, ch. 13, sec. 21) gives authority to search, in the case of suspicion of the existence of a "disorderly house" as defined in sec. 228. The arrest of all persons found in such house is consequently authorized, but no change having been made in sec. 642, such persons cannot be examined under oath for evidence that the place was being kept as a bawdy house, but may be held pending the laying of a charge against them.

Rex v. Shaak (Alta.), 43 D.L.R. 608, [1918] 3 W.W.R. 889.

(§ I—15)—KEEPING—EVIDENCE—QUASHING CONVICTION.

The court on certiorari will look at the evidence given at a summary trial before a police magistrate for keeping a disorderly house, and if there is no evidence of the offence, will quash the conviction.

Rex v. Cross, 29 Can. Cr. Cas. 349, 14 O.W.N. 7.

KEEPING COMMON BAWDY HOUSE—MAGISTRATE'S CONVICTION—CRIMINAL CODE, SEC. 225 (6 & 7 EDW. VII. CH. 8, SEC. 2)—NO EVIDENCE TO SUSTAIN CONVICTION—ORDER QUASHING.

Rex v. Cross, 14 O.W.N. 7.

COMMON BAWDY HOUSE.

A conviction for having kept a bawdy house is illegal, if the word "common" (publique) is not mentioned herein, and will be quashed on habeas corpus.

The King v. O'Brien, 19 Que. P.R. 204.

DISQUALIFICATION.

Of candidates for election, see Elections.

Of public officer, see Officers.

DISTRESS.

For rent, see Landlord and Tenant, III.

See also Mortgage; Levy and Seizure.

DISTRIBUTION.

Of decedent's estate, see Executors and Administrators, IV; Descent and Distribution; Wills.

DISTRICT COURT.

See Courts.

DIVORCE AND SEPARATION.

I. IN GENERAL.

II. SUIT FOR ANNULMENT AND JURISDICTION THEREOF.

III. GROUNDS.

- A. Cruelty; ill-treatment.
- B. Desertion.
- C. Drunkenness; use of morphine.
- D. Imprisonment; miscellaneous.
- E. Adultery.

IV. DEFENCES; CONNIVANCE; RECRIMINATION.

V. ALIMONY.

A. In general.
B. Temporary alimony; suit money.
C. Permanent allowance.
D. Subsequent change.
VI. Other property rights.
VII. Custody and support of children.
VIII. Agreements for support and maintenance.
A. In general.
B. Validity of.

Annotation.

Validity of foreign divorce; domicile: 33 D.L.R. 146, 156.

I. In general.

Annulment of marriage, see Marriage.

II. Suit for annulment and jurisdiction thereof.

(§ II—5)—English divorce laws—Manitoba.

The laws of England, relating to matters within the jurisdiction of Canada, as they stood on July 15, 1870, were given force in Manitoba by sec. 1, ch. 33, 51 Vict. (Dom.); these included the English divorce laws, and the Manitoba Court of King's Bench has full power to administer these laws. [Review of legislation and authorities.]

Walker v. Walker, 39 D.L.R. 731, 28 Man. L.R. 495, [1918] 2 W.W.R. 1, reversing 35 D.L.R. 207, [1917] 2 W.W.R. 1029. [Leave to appeal to Privy Council granted, see 40 D.L.R. 744.]

Imperial Divorce and Matrimonial Causes Act—Northwest Territories.

The law of England relating to divorce and other matrimonial causes, enacted by the Divorce and Matrimonial Causes Act, 1857, was introduced into and given force in that part of the Northwest Territories now comprised in the Province of Alberta by (1886) 49 Vict., ch. 25, sec. 3, (Dom.), R.S.C. 1886, ch. 50, sec. 11. This enactment, continued in Alberta by the Alberta Act, 1905, ch. 3 (Dom.) and by the Alberta Supreme Court Act, 1907 (Alta.), ch. 3, sec. 5, established a substantive law of divorce in Alberta, which the Alberta Supreme Court has full jurisdiction to enforce. [Watts v. Watts, [1908] A.C. 573; Walker v. Walker, 39 D.L.R. 731, followed].

Board v. Board, 41 D.L.R. 286, 13 A.L.R. 362, [1918] 2 W.W.R. 633.

Court of King's Bench, Sask.

The Court of King's Bench in Saskatchewan has no jurisdiction to grant a divorce à vinculo matrimonii. The Act of 49 Vict. (Dom. 1886, ch. 50) creating the Supreme Court of the North-West Territories did not confer such jurisdiction on that court; the argument that it did so is at variance with the enactment of sec. 20, ch. 17, of the Dominion enactment of 1894 conferring on the Legislative Assembly power to confer on the Territorial courts jurisdiction in matters of alimony, also with the King's Bench Act, 1915, which by special enactment conferred on that court jurisdiction in actions of Crim. Con. [Review of authorities and legislation; Walker v. Walker, 39 D.L.R. 731; Board v. Board, 41 D.L.R. 286, not followed.]

Fletcher v. Fletcher (Sask.), 42 D.L.R. 733, 11 S.L.R. 391, [1918] 3 W.W.R. 283.

Pleading—Allegations—Evidence—Cross-demand—Costs.

Art. 190 C.C. (Que.) enacts the doctrine of the old law, by which mutual wrongs of the husband or wife suing for separation may, according to their gravity and sufficiency, to be weighed by the Court, be considered as a circumstance attenuating the complaints on which the action is based and such as to have the action dismissed as ill founded. Consequently the Court before deciding should order evidence on the allegations of the plea tending to shew the grievances of which the plaintiff complains in his action. The compensation resulting from the plaintiff's wrongs may be raised by a plea to the merits; the cross-demand is necessary only in a case where the defendant asks that separation be granted from his husband or wife. The maxim of the old jurisprudence "Le criminel tient le civil en etat," is still a rule of our laws. An allegation made for the sole purpose of insulting the opponent party must be struck out. If the plaintiff fails in most of his contentions, the costs will be set off.

Gouin v. Rene, 19 Que. P.R. 68.

Cross-demand—Similar conclusions.

Where a husband sues his wife for separation from bed and board, the wife may, without any special authorization, reply to the demand by a defence and cross-demand with similar conclusions to those of plaintiff's action.

Flood v. Sparling, 54 Que. S.C. 509.

Service of petition.

Unless a judge so orders, there is nothing to require service upon the husband of the wife's petition asking to sue for separation from bed and board.

Frechette v. Patenaude, 20 Que. P.R. 234.

Particulars.

An action for separation from bed and board, as any other action, must state with precision the place, the day, and all the circumstances of the facts of which the plaintiff complains, so as to put the defendant in a position to oppose the action.

Drolet v. Cousineau, 20 Que. P.R. 40.

Advertising.

One suing for separation from bed and board, who by mistake has not done all the advertisements required by law, may obtain permission to complete them instead of beginning them over again.

Contant v. Pion, 19 Que. P.R. 233.

Domicile and custody of children—Conclusions.

In an action for separation as to bed and board taken under advisement, in which the

plaintiff has made a petition to change her domicile during the suit and to keep her young children, the Court may, notwithstanding such restricted conclusions, go beyond and order a modus vivendi for the husband and wife until the case is decided by a final judgment.

Coutlée v. Hétu, 27 Que. K.B. 442.

ANNULLING DECREE—DOMICILE.

Art. 96, C.C.P., does not apply to actions for annulling a decree of separation from bed and board, which can be taken before the Court of the domicile of the defendant.

Dupuis v. Malo, 19 Que. P.R. 22.

III. Grounds.

A. CRUELTY; ILL-TREATMENT.

(§ III A—15)—ALIMONY—CRUELTY—ASSAULT—INSANE DELUSIONS OF HUSBAND AS TO WIFE'S INFIDELITY—JUDGMENT FOUNDED ON—PLEADING—NECESSITY FOR FULL INVESTIGATION—EXPERT EVIDENCE—INSUFFICIENCY—NEW TRIAL—LEAVE TO AMEND PLEADINGS.

Whimbey v. Whimbey, 14 O.W.N. 128, 158.

B. DESERTION.

(§ III B—25)—LIVING WITH ANOTHER WOMAN—ASSAULT—ALIMONY—JUDICIAL SEPARATION.

The fact that a man leaves his wife and children and lives with another woman, in a house which is manifestly disreputable, and where she has the reputation of being his wife, that he has assaulted his wife and ordered her and her children out of the house and that he has called her vile names—is sufficient ground for maintaining an action for judicial separation and for alimony.

Desautels v. Mailloux, 42 D.L.R. 267, 24 Rev. Leg. 392.

E. ADULTERY.

(§ III E—38)—ACTION BY HUSBAND—ADULTERY BY WIFE—NO DIRECT EVIDENCE OF OFFENCE—PROOF REQUIRED—NO OTHER REASONABLE CONCLUSION.

Fitz Randolph v. Fitz Randolph, 41 D.L.R. 739, 45 N.B.R. 505.

ALIMONY — EVIDENCE — ADULTERY — CRUELTY — DESERTION — DISMISSAL OF ACTION—APPEAL—COSTS.

Frind v. Frind, 14 O.W.N. 133, affirming 12 O.W.N. 245.

SEPARATION DEED—ALLOWANCE TO WIFE—CESSER—ACT "ENTITLING" HUSBAND TO DIVORCE—ADULTERY—APPEAL—AUTHORITY OF PREVIOUS DECISION.

Gordon v. Gordon, 14 O.W.N. 343.

ADULTERY — EVIDENCE — PRESUMPTION — DOMICILE—CHANGE.

Adultery may be proved by any kind of proof, even by simple presumption, the law leaving all discretion to the judge in such matters. In order that there may be flagrante delicto, it is not necessary that the delinquents should have been seen in the accomplishment of the guilty act, it is sufficient that they have been heard in the consummation of the adultery. In an action for separation from bed and board the wife condemned on account of adultery nevertheless retains the right of watching over the maintenance and education of her children. When the husband and wife have not made any marriage covenants, the rule of law which applies is that they are presumed to rely upon the law of the country in which the husband has his domicile at the time of the marriage, and if the latter is domiciled in the Province of Quebec, there is community of property between the husband and wife. A change of residence is not sufficient to transfer the domicile: such change must be accompanied by an intention of definitely abandoning his last domicile, in order to establish permanently his residence in another place. If the law of the new place of residence is contrary to that of the original domicile, and recognizes the separation of property, while that of the former residence establishes the community of property, when there was no contract of marriage between the husband and wife, the intention to change the domicile is not presumed from the fact that the husband is described as separate as to property, in legal proceedings or various written agreements. (Per Carroll, J.: the wife's adultery does not make her lose her rights in the community.)

Malloch v. Graham, 27 Que. K.B. 446.

IV. Defences; connivance; recrimination.

(See previous Annual Digests.)

V. Alimony.

A. IN GENERAL.

(§ V A—45)—PROPERTY TO WIFE—LIS PENDENS—QUANTUM OF INTERIM ALLOWANCE.

Upon an application for interim alimony the defendant set up that the plaintiff was able to maintain herself out of land which he had conveyed to her and out of moneys which her children might allow her. It appeared, however, that, although the plaintiff lived in the house upon the land conveyed to her, the land was tied up by the registration of a certificate of lis pendens, and the allowances from the children would, if made, be no more than compassionate gifts:—Held, that what was thus alleged was no ground for setting aside an order for the payment of $4 a week as interim alimony. [Eaton v. Eaton (1870), L.R. 2 P. & D. 51; Knapp v. Knapp (1887), 12 P.R. 105, distinguished.] Held, also, that the defendant's statement on oath that he had no means out of which payment could be compelled, was no ground for setting aside the order—the plaintiff had the right to test the truth of the statement by an execution.

Peel v. Peel, 42 O.L.R. 165.

JUDGMENT—ARREARS—COSTS—DEATH OF PLAINTIFF.

In an action for alimony the defendant did

not appear or defend, and judgment for the plaintiff was pronounced, on motion therefor, allowing her alimony from the date of issue of the writ of summons, but not before that date, though it was contended that "six years' back alimony" should be allowed. [Robinson v. Robinson (1828), 2 Lee Eccl. R. 593 (appx.); Soules v. Soules (1851), 3 Gr. 113, followed.] The plaintiff was allowed full costs of suit. The motion for judgment was heard on the 8th April; judgment was given on the 12th April. The plaintiff died on the 11th April; and the Judge, having been advised of her death, directed that the judgment should be entered as of the 8th April: see rule 304.

McFadden v. McFadden, 42 O.L.R. 599.

DEFENCE—AWARD OF ALIMONY BY ARBITRATORS—ACCEPTANCE OF ALIMONY PAYMENTS BY WIFE—WAIVER—BAR TO ACTION—OBJECTIONS TO AWARD—RIGHT OF WIFE TO CONTRACT.

Harrison v. Harrison, 42 O.L.R. 43, affirming 41 O.L.R. 195.

HUSBAND AND WIFE—ALIMONY—FAILURE OF WIFE TO PROVE ALLEGATIONS MADE AGAINST HUSBAND—DISMISSAL OF ACTION—EFFECT OF, ON MATRIMONIAL OBLIGATION OF HUSBAND—COSTS—CASH DISBURSEMENTS.

Kingsley v. Kingsley, 14 O.W.N. 181.

REFERENCE — REPORTS — CORPORATION — PAYMENT OUT OF MONEY IN COURT—ALIMONY—COSTS.

Karch v. Edgar, 14 O.W.N. 284.

INTERIM ALLOWANCE—EARNINGS OF WIFE—MEANS OF HUSBAND—ASSIGNMENT BY HUSBAND FOR BENEFIT OF CREDITORS—QUANTUM OF ALLOWANCE—DATE OF COMMENCEMENT OF PAYMENTS—DELAY IN DELIVERY OF STATEMENT OF CLAIM—INTERIM DISBURSEMENTS.

Campbell v. Campbell, 14 O.W.N. 350.

PERMANENT ALLOWANCE—HOW PAYABLE—LUMP SUM—ANNUAL PAYMENTS.

Conway v. Conway, 15 O.W.N. 106.

SECURITY OF COSTS—FOREIGN DIVORCE.

In an action for alimony the fact that the wife has obtained, of her own volition, a divorce in another jurisdiction is not a ground entitling the husband to security for costs. [Lloyd v. Lloyd, 19 D.L.R. 502. applied.] The decisions which hold that a wife who, of her own volition, has obtained in another jurisdiction a divorce which is not recognized by our courts cannot set up, as the lawful wife of her divorced husband, any claim to his property, do not apply to a claim for alimony or for maintenance for the period between the date of desertion and the date of the divorce.

Ackerman v. Ackerman (Alta.), [1918] 2 W.W.R. 759.

LIABILITY OF FATHER-IN-LAW.

When a husband has left the country and is no more under the jurisdiction of the court, his wife, in need of the necessaries of life, is not bound to address herself to him before suing her father-in-law for an alimentary pension.

Racine v. Dansereau, 27 Rev. Leg. 294.

MOTHER-IN-LAW—EVIDENCE—INSURANCE.

Although it is admitted that a wife who needs to be provided for must previously apply to her husband, yet it is sufficient, in order for her to have the right to claim alimony from her mother-in-law, that her husband should be unable to provide for her, or that being able to work to support his family he refuses to do so. It is not necessary for the wife to have that fact declared by the Court in a distinct and separate action; it is only a matter of evidence. Alimony cannot be refused to a wife who has abandoned her husband when she has been forced to do so owing to his ill-treatment and to his refusal to provide for her and her children. A wife, to whom and her children the husband, by marriage contract, has given life insurance amounting to $900, is not bound to realize the amount of that policy before she can claim alimony from her mother-in-law, who is bound, in virtue of the marriage contract, to pay the premium.

Aubry v. Allard, 27 Que. K.B. 416.

B. TEMPORARY ALIMONY; SUIT MONEY.

(§ V B—50)—PROVISIONAL ALLOWANCE.

A wife cannot obtain a provisional allowance from her husband to defray her expenses pending an action for the separation from bed and board, until she obtains permission to live apart from husband.

Roy v. Girouard, 20 Que. P.R. 21.

No provision in the law permits an application for a provisional allowance during an action for an alimentary pension.

Reuttenberg v. Reuttenberg, 19 Que. P.R. 248.

SOLICITORS' FEES—COMMUNITY.

If an action in separation from bed and board is maintained, and the community heretofore existing thereby dissolved, the defendant's solicitors have no right to have their fees and disbursements for unsuccessfully defending the action paid out of the property of the community.

Conroy v. Carroll, 19 Que. P.R. 159.

D. SUBSEQUENT CHANGE.

(§ V D—60)—WIFE CAPABLE OF SELF-SUPPORT.

Where, in an action for separation from bed and board, a husband was ordered to pay an alimentary pension to his wife, he may, by petition, be relieved of his obligation, if his wife has become capable of providing for herself by her work and industry.

Martel v. Page, 20 Que. P.R. 139.

VI. Other property rights.

See Husband and Wife.

VII. Custody and support of children.

See Infants.

(§ VII—75)—JUDGMENT GIVING MOTHER CUSTODY—HABEAS CORPUS—RES JUDICATA.

A child of eleven has not the right to choose for himself, at his will, a domicile different from that of his mother, when the custody of the child has been given to the mother by the Court which has definitely adjudged on the consorts' application for separation from bed and board. A mother, who is deprived of a child's custody given her by the Court, may claim him back by way of habeas corpus. The matter is res judicata when the judgment on the application for separation, and a previous writ of habeas corpus, have been upheld in favour of the mother. So long as the orders giving the child to the mother have not been rescinded by the Court's discretionary power, both the father and child are bound to obey such orders.

Kastel v. Hampton, 20 Que. P.R. 198.

VIII. Agreements for support and maintenance.

See Husband and Wife.

DOCUMENTS.

Order for production, see Discovery.
Documentary evidence, see Evidence, IV.

Annotation.

Questioned documents and proof of handwriting: 44 D.L.R. 170.

DOGS.

See Animals.

DOMICILE.

See Conflict of Laws; Divorce.

(§ I—1)—CONFLICT OF LAWS—FOREIGN DIVORCE.

An absolute decree of divorce granted by a foreign court, confessedly obtained on an untrue statement of facts, and for a cause not recognized by Canadian law, to one who had at the time no bonâ fide domicile in the foreign state, is not effectual in Canada.

Cox v. Cox, 40 D.L.R. 195, 13 A.L.R. 285, [1918] 2 W.W.R. 422.

DOMICILE OF CHOICE—RESIDENCE—MARRIAGE AND DIVORCE—DEVOLUTION OF ESTATES.

In the absence of evidence of a contrary intention, the acquirement of a domicile of choice may be inferred from the circumstances under which a person left his domicile of origin and the length of his residence in the jurisdiction where the domicile of choice is alleged to have been acquired. On an application under the Devolution of Estates Act, R.S.S. 1909, ch. 43, for a direction from the Court as to the person or persons entitled to the estate of the deceased, John Seilo, who married the applicant in Finland in 1888, deserted her and came to the State of Michigan in 1889, and obtained a divorce there in 1900. Held, that, in the absence of evidence to the contrary, the court should conclude from the circumstances under which the deceased left Finland and the length of his residence in Michigan that he had acquired a domicile there at the time of the decree of divorce.

Re Seilo Estate (Sask.), [1918] 1 W.W.R. 441.

ELECTION OF DOMICILE—SUBSEQUENT LAW.

An election of domicile made in a contract or note cannot be affected by a law subsequently passed.

La Cie d'Assurance Mutuelle du Commerce contre L'incendie v. Lalancette, 20 Que. P.R. 142.

DONATIO MORTIS CAUSA.

See Gift.

DOWER.

(§ I A—5)—LUMP SUM IN LIEU OF—CALCULATION UPON VALUE OF LAND—DEDUCTING AMOUNT OF MORTGAGE—ARREARS OF DOWER—COSTS.

Jaynes v. Jaynes, 14 O.W.N. 193.

DRAINS AND SEWERS.

Annotation.

Cost of work; power of referee: 21 D.L.R. 286.

(§ II—10)—DITCHES AND WATERCOURSES ACT—APPEAL FROM AWARD.

An appeal to a County Judge, under sec. 21 of the Ditches and Watercourses Act, R.S.O. 1914, ch. 260, is a re-hearing, and all objections as to the regularity of the award should be made then; if no appeal has been taken within the time limited, the award is valid and binding under sec. 23 of the Act.

Otto v. Roger and Kelly, 38 D.L.R. 668, 40 O.L.R. 381, affirming 35 D.L.R. 339, 39 O.L.R. 127.

AWARD—REGISTRATION.

The effect of an award under the Ditches and Watercourses Act, R.S.O. 1914, ch. 260, is to subject the lands affected by it to an easement: it is therefore an instrument affecting the land within the meaning of the Registry Act, R.S.O. 1914, ch. 124, sec. 71, and should be registered; it does not bind a bonâ fide purchaser for value without notice.

Delbridge v. Tp. of Brantford, 38 D.L.R. 677, 40 O.L.R. 443.

DRUGS AND DRUGGISTS.

See Intoxicating Liquors.

DRUNKENNESS.

See Intoxicating Liquors.

DURESS.

As affecting validity of documents, see Deeds; Wills; Contracts.

DUTIES.

Succession duties, see Taxes.

(§ I—18)—VESSELS LIABLE FOR CUSTOMS DUTIES.

A ship or vessel and its equipment built in

a foreign country for show purposes only is not subject to customs duty under items 589 or 590, schedule A, of the Customs Tariff Act (Can. Stats. 1907, ch. 11); it may be sold or disposed of within Canada, so long as it is not to be used in Canadian waters.

Neville Canneries v. S.S. "Santa Maria" (Ex.), 41 D.L.R. 32 [See also Neville Canneries v. "Santa Maria," 36 D.L.R. 619, 16 Can. Ex. 481.]

EASEMENTS.

I. What constitutes; nature; kind.
II. Creation; how acquired.
A. In general; by express terms.
B. By prescription.
C. As appurtenant; by necessity.
III. Extent of rights.
IV. How lost.

Annotations.

Easement by implication; servient and dominant tenements: 32 D.L.R. 114.

Right of profit à prendre: 40 D.L.R. 144.

I. What constitutes; nature; kind.

(§ I—1)—Deed—Interpretation.

In construing an easement, guaranteed by a duly registered deed, where the meaning of the same is doubtful, the common intention of the contracting parties must be sought and determined by interpretation rather than by an adherence to the literal meaning of the words of the contract.

Lemieux v. The King, 38 D.L.R. 711, 16 Can. Ex. 246.

Thoroughfare—Contribution to costs of.

Since no servitude can be established without title, an understanding between certain farmers and the owner of a dairy, under which the farmers, by contributing a little towards the construction of a road over the owner's land, had obtained permission to go on in order to reach the dairy, does not constitute a title creating a servitude of thoroughfare, even if the municipality had contributed a small sum to purchase the wire for the fences on each side of the road.

Germain v. Hébert, 27 Que. K.B. 532.

II. Creation; how acquired.

A. In general; by express terms.

(§ II A—5)—Lands appurtenant—Right of way.

In a conveyance of a house and lot were these words: "Together with a right of way for the purpose only of getting in . . . fuel and for the passage of an automobile over the 6 feet adjoining the premises hereby conveyed to the north to a depth of 76 feet . . . and subject to a right of way for the party of the first part and the owners or occupants of the adjacent premises to the north over the northerly 2 ft. 6 inches to a depth of 76 ft." The Court held that upon a proper construction of the words quoted, the right of way over the 2 feet 6 inches was limited to the owners or occupants of the parcel on which the house to the north stood and to which the easement was appurtenant. A colourable use could not be made of such right of way for the real purpose of reaching a different adjoining close.

Miller v. Tipling, 43 D.L.R. 469, 43 O.L.R. 88.

Building plan — Passageway — Party wall.

Where adjoining owners construct their buildings according to a party wall plan and one is given a passageway to his building by means of a communicating door through the party wall, a valid easement is created to the stairways and passageways necessary for the proper user of his building, which is co-extensive with the duration of the building. As a condition precedent to the relief being granted, the party seeking such relief must himself do equity by paying his share of the cost of the party wall. [Acton Tanning Co. v. Toronto Suburban R. Co., 40 D.L.R. 421, referred to.]

Smith v. Curry (Man.), 42 D.L.R. 225, [1918] 2 W.W.R. 848, varying 36 D.L.R. 400.

Reservation of cattle-pass under highway—Covenant to repair—Devise of dominant tenement—Severance.

Land for a highway, laid out in 1857, was granted by M. to the defendant township corporation, and the right to a cattle-pass under the highway, to be made and maintained and repaired by the defendant corporation, was reserved to M. Held, that there was a grant, subject to an easement; it was not a case of a separate and independent convenant imposing a duty on the defendant corporation in favour of M. [Austerberry v. Corporation of Oldham (1885), 29 Ch.D. 750, distinguished.] Held, also, that the easement, including the obligation to maintain and repair, passed by M.'s will with the land which remained to M., the dominant tenement; and was not destroyed by the severance in title (by the will) of the north and south halves of the dominant tenement.

Freeman v. Township of Camden, 41 O.L.R. 179.

Building—Access of air and light—Infrigement—Pleading—Statement of claim — Unity of seisin — Implied grant — Prescription — Alternative claims—Amendment.

Business Realty Limited v. Loew's Hamilton Theatres Limited, 15 O.W.N. 135.

Window—Tenant—Negatory action.

The owner of a house cannot be sued by a negatory action on account of the opening of a window looking from a prohibited distance on the neighbour's property, when such a state of things was established, without his knowledge, by a tenant who had obtained permission from the complainant.

Lachance v. Mathieu, 54 Que. S.C. 479.

RIGHT TO WHARFAGE—REAL OR PERSONAL RIGHT—REGISTRATION—DAMAGES.

A clause in a deed that "the said Emery Dutour sells and assigns from this day for ever to the said Napoleon Amesse, all rights to operate a ferry in flat-bottom boats or barges and to disembark on the northern part of the said Dutour's land" does not, in any way, include the creation of a real servitude, but is only the transfer and sale of personal rights rendering the vendor liable for damages in the case of contravention; and the registration of such deed as a charge on the vendor's property is illegal and null. When the holder of certain rights declares that they have been granted to him by his vendor, who held them from those preceding him in title, he must allege and prove that the latter granted to him, and must establish the claim of title between him and the first holder; it is not sufficient to produce his immediate title; otherwise the registration of his rights is illegal, and may be struck out upon an application to the Court. One who illegally and without right registers a charge upon real property, which prevents the owner from making an advantageous sale, is liable for the damages which the latter sustains. Such damages should include interest upon the sale price.

Dutour v. Bastien, 54 Que. S.C. 54.

C. AS APPURTENANT; BY NECESSITY.

(§ II C—29)—PRIVATE RIGHT OF WAY APPURTENANT TO LAND—EXTINCTION BY SALE OF SERVIENT TENEMENT FOR TAXES—ASSESSMENT ACT, R.S.O. 1897, CH. 224, SECS. 7, 149—MUNICIPAL ACT, R.S.O. 1897, CH. 223, SEC. 2 (8)—"LAND."

A. J. Reach Co. v. Crosland, 15 O.W.N. 85, affirming 14 O.W.N. 247, 43 O.L.R. 209.

III. Extent of rights.

(§ III—30)—RIGHT OF WAY—STANDING OF VEHICLES—NEGATORY ACTION.

A right to a servitude of way to communicate from the street to an interior court does not imply a right to have vehicles stand there for loading or unloading. These acts constitute an aggravation of servitude, which the owner of the servient land is justified in checking by way of a negatory action.

Cantin v. Borne, 54 Que. S.C. 470.

RIGHT OF FISHING—BED OF RIVER—RIGHTS OF PARTIES.

A concession by the owner of a river-bank property neither navigable or floatable of "all his rights of fishing in the river, opposite the lot of the grantor, known under the letter C," does not confer on the grantee a personal servitude or a simple right of user, but an actual jus in re or right of ownership in the bed of the river for the purpose of fishing (the Chief Justice is of the opinion that this right is one of usufruct). (2) The preservation of this right of ownership is not subject to the formality of renewal of registration of title after the cadastral plan takes effect. (3) This right of ownership, limited in its object, permits nevertheless the co-existence, in favour of the owner of the river bank, of his right to the bottom for all purposes other than that of fishing.

Duchaine v. Matamajaw Salmon Club, 27 Que. K.B. 196. [Reversed by Supreme Court of Canada.]

IV. How lost.

(§ IV—45)—RIGHT OF WAY—PRIOR HYPOTHECARY CREDITOR—RES JUDICATA.

A servitude of right of way created by the owner on his property cannot affect the rights of a previous hypothecary creditor, if the latter exercises his rights either before the judicial sale by an hypothecary action or after the sale on the distribution of the proceeds of the sale. But if he allows the sheriff to sell the property, he cannot claim priority of his hypothecary right, which is swept away on that servitude. The sale of a piece of ground made by the sheriff at the request of that hypothecary creditor does not radiate that servitude. When an immovable property on which some one has a right of way is advertised to be judicially sold, and if that owner makes an opposition to have his servitude, which is contested by an hypothecary creditor and set aside by the Court, recognized, there is no "res judicata" between the opposant and that hypothecary creditor in a subsequent negatory action taken to have declared that such a right of way has been got rid of by the sheriff's sale as far as that hypothecary creditor is concerned. The right of way in a lane generally includes the right of ingress and egress.

Loranger v. Aubry, 27 Que. K.B. 519.

EAVESDROPPING.

AS CRIMINAL OFFENCE.

Eavesdropping is not a punishable offence either under the common law of England or the criminal law of Canada.

The King v. Mason (Que.), 39 D.L.R. 54, 29 Can. Cr. Cas. 210.

ECCLESIASTICAL LAW.

See Religious Institutions; Benevolent Societies.

EJECTMENT.

Eviction by landlord, see Landlord and Tenant.

Annotation.

Ejectment as between trespassers upon unpatented land; effect of priority of possessory acts under colour of title: 1 D.L.R. 28.

ACTION TO RECOVER POSSESSION—EVIDENCE—ONUS—BOUNDARIES—POSSESSION, USE, AND OCCUPATION—DISMISSAL OF ACTION AND OF COUNTERCLAIM FOR DAMAGES.

Brown v. Touks, 14 O.W.N. 46.

ELECTION OF REMEDIES.

See Action; Pleading.

ELECTIONS.

I. Voters.
A. Right to vote; residence.
B. Registration; voters' lists.
II. Elections.
A. In general.
B. Ballots.
C. Result; recounts.
D. Election frauds; crimes.
III. Nominations.
IV. Contests.

I. Voters.

A. Right to vote; residence.

(§ I A—6)—Municipal by-law—Liquor license.

It is not sufficient to have one's name inscribed on the assessment roll, it is necessary for the legal exercise of municipal franchise that the party shall possess the qualifications required by law, one of which is that the elector shall be a British subject. In the case now submitted 21 votes were given by parties who were not naturalized British subjects and such votes were illegally recorded, and as a consequence the vote on the by-law is, therefore, illegal and must be so declared.

St. Germain v. City of Lachine, 24 Rev. de Jur. 76.

B. Registration; voters' lists.

(§ I B—12)—Voters' list—Omission—Rectification — Jurisdiction of Superior Court.

When an elector's name has been, by error or otherwise, omitted from the electoral list for the legislature of Quebec, the Superior Court has jurisdiction to order the municipal corporation, which made and confirmed the list, to insert therein the name of such elector.

Bédard v. Notre-Dame-de-Stanbridge, 54 Que. S.C. 405.

II. Elections.

A. In general.

(§ II A—15)—Municipal election—Refusal to preside—Notice.

The secretary-treasurer of a municipality, bound ex officio to preside at an election of councillors, should fulfil this duty on the day fixed by the law, even when the previous public notice has not been regularly given. If he refuses to do so, he incurs the penalty provided by art. 254, Mun. Code.

Bureau v. Soulard, 54 Que. S.C. 507.

Municipal election—Presiding officer—Vacancy.

A majority of the electors at an election meeting cannot elect a presiding officer, to remedy the absence or incapacity of the one appointed, except at the first election in a newly organized municipality. When a municipal election meeting has been opened and closed, by the person regularly appointed to preside over such meeting, the meeting cannot be continued or recommenced under the presidency of another person.

Olivier v. Roger, 53 Que. S.C. 136.

Residence—Living in different places.

The respondent, a bachelor, had for 14 years last past been engaged as his only business in farming lands which he owned in the municipality of St. Vital. During spring, summer and autumn he was almost constantly on his farm, but frequently went into Winnipeg to visit his sisters and brother-in-law, and slept during the summer more than half the time at the house occupied by them. During the winter he visited the farm every week and slept there occasionally, but most of the time at said house in Winnipeg. The house was owned by him but occupied by his sisters and brother-in-law rent free, and he, on the other hand, paid nothing for his meals and lodging when with them. Held, on the above facts, that the respondent was not an actual resident of St. Vital.

Mitchell v. Johnson (Man.), [1918] 1 W.W.R. 785.

III. Nominations.

Qualification of candidates, see Officers.

IV. Contests.

(§ IV—90)—Municipal election—Corruption—Judgment voiding election—Appeal—Non-suit—Public notice.

Contestations of municipal elections are proceedings of public order, in which any elector has the right to intervene in order to continue them, when the applicant threatens to abandon by collusion. When a municipal election for mayor or councillor has been voided on account of violence and corruption, and that upon an appeal to the Court of Review, the applicant discontinues the judgment rendered, the Court should, for reasons of public order, refuse to have such discontinuance noted in the record, unless public notice is given in the municipality concerned, and the parties file a sworn declaration that the arrangement is not collusive.

Naud v. Ferron, 53 Que. S.C. 1.

ELECTRICITY.

Electric wires—Accident—Presumption—Force majeure.

According to modern law, the owner of things which are under his care is liable for damages which they cause, if he does not rebut the presumption of fault arising from art. 1054 C.C. (Que.). The liability of an electric company for damages caused by broken wires of its transmission lines is not removed by proving that on the day of the accident there was a storm, and that wires were broken in several places in the town.

Senécal v. Montreal Public Service Corp., 54 Que. S.C. 80.

ELECTRIC RAILWAYS.

See Street Railways; Carriers; Railways.

EMBEZZLEMENT.

See Theft.

EMINENT DOMAIN.

See Expropriation.

EMPLOYER'S LIABILITY.

See Master and Servant.

ENEMY ALIEN.

See Aliens.

ENLISTMENT.

See Military Law.

EQUITABLE ASSIGNMENT.

See Assignment, II.

EQUITY.

Annotation.

Fusion with law; Pleading: 10 D.L.R. 503.

ESCAPE.

(§ I—5)—Arrest without warrant.

On a charge of escaping from the custody of a police officer after an alleged arrest, the legality of the arrest must be shewn.

Rex v. Stackhouse (N.S.), 41 D.L.R. 420, 29 Can. Cr. Cas. 151.

Re-caption—Prisoner in hospital.

When the period of imprisonment under a warrant of commitment following a summary conviction has begun to run, there can be no arrest to serve the remainder of the sentence after the period specified has expired by effluxion of time computed from the commencement of the imprisonment, because of the accused having been taken from gaol to a hospital whence she was allowed to depart without any attempt at re-caption during the unexpired period of her sentence.

Rex v. Peters (N.S.), 29 Can. Cr. Cas. 298.

ESCHEAT.

Annotation.

Provincial rights in Dominion lands: 26 D.L.R. 137.

ESTATES.

See Deeds; Wills, III; Easements; Adverse Possession; Land Titles.

ESTOPPEL.

I. Of municipality or of Crown.
- A. Of municipality.
- B. Of Crown.

II. By deed or record.
- A. By deed.
- B. By bond or mortgage.
- C. By record.

III. Equitable estoppel or estoppel in pais.
- A. In general; effect.
- B. Of married women.
- C. As to corporate existence of powers.
- D. By contracts or agreements generally; ratification.
- E. By conduct, request or admissions generally.
- F. By assent.
- G. By laches, silence or acquiescence.
- H. By representations.
- I. By negligence or fraud.
- J. By inconsistence in acts, claims, etc.
- K. By receiving benefits.
- L. By character or relation of parties.
- M. Who affected.
- N. Who may be set up.

Annotations.

Ratification of agency; Holding out as ostensible agent: 1 D.L.R. 149.

Estoppel by conduct; Fraud of agent or employee: 21 D.L.R. 13.

Estoppel as against setting up ultra vires as a defence in actions on corporate contracts: 36 D.L.R. 107.

I. Of municipality or of Crown.

(See previous Annual Digests.)

II. By deed or record.

C. By record.

(§ II C—35)—Res judicata—Summary conviction — Certiorari — Habeas corpus.

The doctrine of res judicata applies to prevent an appellate Court reopening at the instance of the accused, on an appeal from a habeas corpus order which refused a discharge from custody, the question of the validity of the summary conviction in question which had previously been decided against the accused on her motion to quash the conviction itself against which decision no appeal had been taken. (Per Riddell and Rose, JJ.)

Rex v. Jackson, 29 Can. Cr. Cas. 352, 40 O.L.R. 173; 12 O.W.N. 315 affirming 12 O.W.N. 191. [See 12 O.W.N. 77, 161.]

III. Equitable estoppel or estoppel in pais.

E. By conduct, request or admissions generally.

(§ III E—70)—Purchase of goods by branch office—Head office having no knowledge—Agent not authorised to purchase—Estoppel from denying authority.

Farm Products v. Macleod Flouring Mills (Alta.), 43 D.L.R. 770.

EVICTION.

See Landlord and Tenant.

EVIDENCE.

I. Judicial notice.
- A. Laws and ordinances.
- B. Proclamation.
- C. Official and judicial character of acts.
- D. Political, historical and geographical matters.
- E. Other matters.
- F. By jury.

II. Presumptions and burden of proof.
- A. In general; laws; ordinances.
- B. Establishing allegations or claims.
- C. Defences.
- D. Exceptions or exemptions.
- E. Concerning person.
- F. Corporations; partnership.
- G. Continuance; cause.

H. As to skill; negligence; care.
I. As to official acts.
J. From circumstances and course of business.
K. As to rights, contracts, instruments, and property.
L. Payment; credit.
M. Miscellaneous.

III. BEST AND SECONDARY EVIDENCE.

IV. DOCUMENTARY EVIDENCE.
A. Preliminary matters; genuineness and validity.
B. Statutes; ordinances.
C. Certificate; award.
D. Official records, reports and returns.
E. Judgments and judicial records.
F. Pleadings and papers in suit.
G. Evidence previously taken or used; affidavits.
H. Tax book or list.
I. Deeds; wills; leases; mortgages.
J. Accounts and account books.
K. Letters, telegrams, etc.
L. Records and papers of corporations or carriers.
M. Note; indorsement.
N. Contracts.
O. Scientific and medical books.
P. For purposes of comparison.
Q. Memoranda.
R. Miscellaneous.
S. Paper produced on notice.
T. Putting whole writing in evidence.

V. DEMONSTRATIVE EVIDENCE; ARTICLES AND THINGS; VIEW OF JURY.

VI. PAROL AND EXTRINSIC EVIDENCE CONCERNING WRITINGS.
A. In general.
B. Custom, or usage.
C. Prior and collateral parol agreements.
D. Subsequent change.
E. Meaning; intention; explanation.
F. As to commercial paper.
G. Consideration, or value of subject matter.
H. Fraud; mistake; omissions.
I. Condition; trust; mortgage.
J. To identify subject or person.
K. Circumstances.
L. Concerning records.
M. Character of party.

VII. OPINIONS AND CONCLUSIONS.
A. In general.
B. Hypothetical questions.
C. Cause and effect.
D. Physical conditions; medical testimony; intoxication.
E. Sanity; capacity; character.
F. Values; damages.
G. Contingent results; what might have been.
H. Legal questions; meaning of terms; foreign laws.
I. Estimates of quantity; speed; time.
J. Danger; skill; negligence.
K. Intent; mental conditions.
L. Appearance; identity; quality; authenticity.
M. Handwriting.
N. Miscellaneous.

VIII. CONFESSIONS; TESTIMONY OR EVIDENCE WRONGFULLY OBTAINED.

IX. ADMISSIONS.

X. HEARSAY, DECLARATION; RES GESTÆ.
A. In general; pedigree; reputation.
B. Confidential communications.
C. Party's own acts and declaration.
D. Acts and declarations of third persons generally.
E. Acts and declarations of agent, representative or tenant.
F. Acts and declarations of former party in interest; testator or former owner.
G. Acts and declarations of partner; associate or co-conspirator.
H. Complaints of injuries and suffering.
I. Threats.
J. Telephone conversations.
K. Conversation through interpreter.
L. Dying declarations, or those made in travail.
M. Former testimony.

XI. RELEVANCY AND MATERIALITY.
A. In general.
B. Custom or habit.
C. Character; reputation; age.
D. Knowledge; notice; belief; mental capacity.
E. Intent; motive; fraud; undue influence; good faith; malice.
F. Prices; values.
G. Damages.
H. Care; skill; negligence.
I. Suggestive facts; facts supporting inferences.
J. Circumstances.
K. Similar acts or facts.
L. Explanation and rebuttal.
M. Payment; consideration; credit.
N. Proof of negative.
O. Contracts; breach; waiver.
P. Matters pending suit.
Q. Pecuniary condition; family circumstances.
R. Persons; personal relations.
S. Connecting with subject; matters about other persons.
T. Criminal matters generally.
U. Title or possession.
V. Identification.
W. Justification; mitigation.
X. Authority.
Y. Experiments.
Z. Miscellaneous.

XII. WEIGHT, EFFECT AND SUFFICIENCY.
A. In general; corroboration.
B. Cause and effect.
C. Fraud or good faith; malice; undue influence.
D. Negligence; skill; care.
E. As to property rights.
F. Matters as to persons; relation of parties.
G. To overcome writing, pleading, or judicial proceedings.

H. Documents generally; official acts or record; demonstrative evidence.
I. Contracts; gifts.
J. Wills.
K. Miscellaneous civil cases.
L. Criminal cases.
XIII. ADMISSIBILITY UNDER PLEADINGS; VARIANCE.
A. Under particular pleadings.
B. Variance.

Review on appeal, see Appeal.
As to discovery, see Discovery and Inspection.
New trial for newly discovered or for insufficient evidence, see New Trial.
Instructions upon, see Trial.
Depositions and commissions to take, see Depositions.
Witnesses generally, see Witnesses.

Annotations.

Admissibility; competency of wife against husband: 17 D.L.R. 721.
Admissibility; discretion as to commission evidence: 13 D.L.R. 338.
Criminal law; questioning accused person in custody: 16 D.L.R. 223.
Extrinsic; when admissible against a foreign judgment: 9 D.L.R. 788.
Demonstrative evidence; view of locus in quo in criminal trial: 10 D.L.R. 97.
Meaning of "half" of a lot; division of irregular lot: 2 D.L.R. 143.
Opinion evidence as to handwriting: 13 D.L.R. 565.
Oral contracts; Statute of Frauds; effect of admission in pleading: 2 D.L.R. 636.
Proof of alienage: 23 D.L.R. 375, 376.
Deed intended as mortgage; competency and sufficiency of parol evidence: 29 D.L.R. 125.
Medical expert witnesses: 38 D.L.R. 453; 28 Can. Cr. Cas. 308.
Law relating to questioned documents and proof of handwriting: 44 D.L.R. 170.

I. Judicial notice.

(See previous Annual Digests.)

II. Presumptions and burden of proof.

B. ESTABLISHING ALLEGATIONS OR CLAIMS.

(§ II B—108)—ACCIDENT CAUSING DEATH—PRESUMPTION OF FAULT.

In an action claiming damages for the death of an employee due to an accident caused by an inanimate object, the French jurisprudence creates a presumption of fault against the custodian of such object and places upon him the burden of proving that the injury proceeded from a cause to which he was a stranger.

Norcross Bros. Co. v. Gohier, 41 D.L.R. 687, 56 Can. S.C.R. 415.

(§ II B—114)—JUDGMENT—ENTRY—NEW EVIDENCE.

A Court or Judge is not bound by any decision until the judgment or order has actually been taken out and entered. If there are material facts which were not brought to his attention at the trial, he should hear them, and should consider affidavits as to further evidence suggested or proposed to be given and the circumstances under which and when it was discovered.

Stevenson v. Dandy (Alta.), 43 D.L.R. 238, [1918] 3 W.W.R. 662.

III. Best and secondary evidence.

(See previous Annual Digests.)

IV. Documentary evidence.

A. PRELIMINARY MATTERS; GENUINENESS AND VALIDITY.

(§ IV A—385)—CONCURRENT AGREEMENT.

In accordance with the ordinary rules, an agreement concurrent with another writing may be proved by witnesses, and even constitutes a real condition of the written contract.

Lachance v. Petit, 53 Que. S.C. 368.

B. STATUTES; ORDINANCES.

(§ IV B—396)—FOREIGN STATUTES—EXTRADITION.

The provincial laws of evidence are applicable to extradition proceedings by virtue of the Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 35, and where such proceedings take place in the Province of New Brunswick the provincial statute C.S.N.B. 1903, ch. 127, sec. 58, applies to make a copy of a statute of the demanding State authenticated under the seal of that State, prima facie evidence that the foreign law is as there enacted. [Re Arton (No. 2), [1896] 1 Q.B. 509, discussed.]

Ex parte Thomas, 38 D.L.R. 716, 45 N.B.R. 148, 28 Can. Cr. Cas. 396.

D. OFFICIAL RECORDS, REPORTS AND RETURNS.

(§ IV D—405)—COPY AS "SUFFICIENT EVIDENCE."

Under sec. 45, Evidence Act, R.S.B.C. 1911, which makes provision for the production of copies of original instruments certified under the hand and seal of the registrar and provides that "in every such case the copy so certified shall be sufficient evidence of the original instrument and of its validity and contents," a copy of an original document offered in evidence under said section can have no greater effect than the original would have if it were produced.

Dinsmore v. Philip (B.C.), [1918] 3 W.W.R. 457, reversing [1918] 1 W.W.R. 405.

E. JUDGMENTS AND JUDICIAL RECORDS.

(§ IV E—412)—OF PRIOR SUMMARY CONVICTION.

Where no formal conviction has been drawn up the "minute or memorandum" of the summary conviction made in conformity with Cr. Code sec. 727 and proved by the Police Court clerk having the custody thereof is admissible to prove such conviction on a charge of a subsequent offence before the

same magistrate. [Commissioner of Police v. Donovan, [1903] 1 K.B. 895, followed.]

Rex v. Tansley, 38 D.L.R. 339, 12 A.L.R. 84, 28 Can. Cr. Cas. 280, [1917] 2 W.W.R. 1025, affirmed in 29 Can. Cr. Cas. 225, 12 A.L.R. 84.

PRIOR SUMMARY CONVICTION—LIQUOR ACT.

A memorandum signed by the magistrate in his docket at the time of a summary conviction for an offence under the Liquor Act, 1916 (Alta.), will be admissible to prove same before the same magistrate as a prior conviction upon a charge for a second offence, if no formal conviction for such prior offence had been drawn up. It is the fact of the first offence, not the first conviction, under secs. 40 and 60 of the Liquor Act, 1916, Alta., that attaches the increased penalty to the second, and, on proof of the offence charged as a second offence and on proof of the previous conviction under the Act for an offence of a prior date to that being tried, a conviction with the increased penalty for a second offence is justified. In proving the prior offence by a prior conviction which had not been attacked, regard need be had only to the adjudication of guilt, and the fact that the punishment awarded on the prior conviction was in excess of the statutory limit will not affect the validity of the adjudication of guilt when proof of same is adduced on the second charge as evidence of the prior offence.

Rex v. Tansley (No. 2) (Alta.), 29 Can. Cr. Cas. 225, 12 A.L.R. 84, [1917] 3 W.W.R. 70, affirming 38 D.L.R. 339, 28 Can. Cr. Cas. 280.

G. EVIDENCE PREVIOUSLY TAKEN OR USED; AFFIDAVITS.

(§ IV G — 422) — DEPOSITIONS — STENOGRAPHER'S NOTES.

If one party does not put on the record the stenographic notes of the depositions of his witnesses, the other party may, by motion, ask that they be placed on the record within a fixed delay; and on his failing to do so the Court will give judgment as if such evidence had not been given.

Arseneault v. Vachon, 20 Que. P.R. 195.

K. LETTERS, TELEGRAMS, ETC.

(§ IV K—440)—LETTER OF ATTORNEY—AFFIDAVIT.

In an action of disavowal against an attorney, held that a letter addressed by him to his client, even if sufficiently proved, did not constitute proof which can combat the judicial avowal contained in a sworn affidavit produced by the plaintiff, in which he described himself as being "one of the plaintiffs," such document being absolute proof against him on the question of authorization of his attorney to bind the action.

Paradis v. Nantel, 24 Rev. Leg. 123.

V. Demonstrative evidence; articles and things; view of jury.

(See previous Annual Digests.)

VI. Parol and extrinsic evidence concerning writings.

A. IN GENERAL.

(§ VI A—515)—WRITING CONTAINING PART OF CONTRACT.

In applying the rule that oral evidence of a contract is admissible where it is contended that the writing relied upon does not contain the whole agreement, the distinction must be observed between an oral condition postponing the operation of a written instrument and an oral agreement which can affect the instrument only after it has come into operation. [Long v. Smith, 23 O.L.R. 121; Carter v. C.N.R., 23 O.L.R. 140, referred to.]

Morse v. Mac & Mac Cedar Co. (B.C.), [1918] 2 W.W.R. 205.

LOAN — INTEREST — COMMENCEMENT OF PROOF IN WRITING—PRESUMPTION.

If a defendant pleads to an action for repayment of a loan that he has paid the interest but he does not owe the capital, and at the hearing admitted that the sum claimed had been given him by the plaintiff's grantor in consideration of the payment of interest during the life of the donor, there are, in these circumstances, a divisible admission and a commencement of proof in writing which allow the admission of parol evidence. The payment of interest upon a sum of money is a presumption of a loan rather than a gift.

Laplante v. Frappier, 24 Rev. Leg. 286.

SALE OF LAND—JUDICIAL ADMISSION—COMMISSIONS—CUSTOM.

A contract for sale of land on commission, between an owner and an agent, is not a commercial contract, and cannot be proved by witnesses unless there is a commencement of proof by writing. A judicial admission may be divided according to circumstances, in the discretion of the Court, when the part of the admission objected to is impossible or invalidated by contrary evidence. According to established custom, the commission to be paid such agent, when at the vendor's request he finds a purchaser, is 2½% upon the sale price.

Laporte v. Denault, 24 Rev. Leg. 248.

E. MEANING; INTENTION; EXPLANATION.

(§ VI E — 535) — CONTRACT — SALE — "ABOUT."

The plaintiff company sold and delivered to the defendant company, under a written contract, a quantity of mill machinery, one condition of the contract being that it could not be varied or added to by any agreement not expressly stated therein. In an action for an unpaid balance of the purchase money the defendant company set up in its counterclaim, in addition to other items, a claim for damages resulting from breaches of parol agreements in respect to the subject matter of the contract. Held, that as the contract was meant to contain the whole bargain between the parties, evidence respecting the parol agreements could not be received. The

contract provided for shipment, "delivered f.o.b. cars Fairville, N.B., about six weeks from receipt of order." Held, that evidence could not be received to shew that the word "about" was intended to be used by the parties with any other than the ordinary and natural meaning.

Berlin Machine Works v. Randolph, 45 N.B.R. 201.

F. As to commercial paper.

(§ VI F—540)—Collateral agreements—Simulation.

Bills of exchange, promissory notes and cheques are commercial documents, and all agreements or transactions which relate to them are, consequently, commercial matters. English law allows parol evidence of a collateral or secondary contract made at the same time as the written contract. Proving such a collateral contract is not contradicting or changing the terms of the written contract. An admission is divisible when one part of the reply is invalidated by allegations of fraud or simulation, or does not agree with the pleadings. Art. 1210 C.C. (Que.), which establishes the principle that an authentic writing makes complete proof of the agreements to which it relates, has an exception where the writing is attacked on the ground of simulation; parol evidence is then admissible to shew the simulation, as it does not vary the terms of a valid written instrument. In the examination of evidence including simulation all the writings of the parties relating to the agreement or transaction should be interpreted one with the other, as forming a single agreement.

Lacouture v. Badeau, 24 Rev. de Jur. 516.

H. Fraud; mistake; omissions.

(§ VI H—560)—Contract—Misrepresentations.

One knowing how to read and write, who signs an agreement without reading it, cannot be allowed to prove by witnesses fraudulent representations the other party had made upon the tenor of the agreement, in order to induce him to sign it.

Paré v. La Compagnie Carette, 54 Que. S.C. 231, affirming 53 Que. S.C. 306.

L. Concerning records.

(§ VI L—580)—Attachment.

Proof of the existence of a judicial proceeding, such as an attachment after judgment which has been destroyed by a party himself or by his agent, cannot be made by witnesses.

Giroux v. Martin, 24 Rev. Leg. 195.

M. Character of party.

(§ VI M—587)—Partnership—Payment—Real estate agent—Commissions.

A commercial partnership, no more than a civil partnership, cannot be proved by witnesses. It is only in a case where a third person acknowledges that a partnership is his creditor or his debtor that he can prove by witnesses the existence of such partnership, but such proof is not admissible when third person has only contracted with a partner personally. (2) If a payment made to another than the creditor is valid in a case where the one who receives the payment is the actual owner of the debt, the debtor ought then to prove the existence of the rights of such creditor to accept the payment according to the rules to which the latter would be himself subject. (3) There is no commencement of proof by writing, allowing proof by witnesses of the existence of a partnership to carry on the business of real estate agents, in the admission of one of the partners that, in two later instances, he has divided with the other partner his commission upon sales made by the instrumentality of the latter.

Lamontagne v. Lafontaine, 53 Que. S.C. 326.

VII. Opinions and conclusions.

E. Sanity; capacity; character.

(§ VII E—615)—Opinion of expert.

The fact that an expert witness giving only opinion evidence for the defence was not cross-examined for the prosecution, nor was his evidence contradicted, does not place an obligation upon the trial Judge to direct the jury that they are bound to accept the evidence as correct; it is properly left to the jury to accept or reject such opinion evidence. [See annotation on medical expert witnesses at end of this case.]

Rex v. Moke, 38 D.L.R. 441 (annotated), 12 A.L.R. 18, 28 Can. Cr. Cas. 296.

J. Danger; skill; negligence.

(§ VII J—643)—Shunting train — Coupling pin—Injury to employee.

The undisputed evidence that an employee of a railway company who was employed to heat the cars in the railway yard, while attending to his duties, was going from a second-class car to the baggage car for coal, that as he was reaching for the door of the baggage car the train suddenly stopped, the baggage car and the second class car parted from the breaking of a knuckle pin, the employee being thrown to the ground and injured by the wheels of the baggage car, is sufficient evidence to justify the jury in finding that the injuries were the result of the negligence of the company in stopping the train too suddenly, when air brakes and safety chains were not in use.

Worsley v. Canadian Northern R. Co. 43 D.L.R. 287, 11 S.L.R. 473, [1918] 3 W.W.R. 638.

M. Handwriting.

(§ VII M—661) — Comparison of handwriting—Forgery.

Evidence by comparison of writing should always be received by the Courts with great care; the test of genuineness ought to be the resemblances between the writings compared in their general character and not in the manner of forming particular letters. The

most efficacious means of shewing the general character of handwriting where evidence by comparison of handwriting is produced, is by witnesses who have seen the accused write when his mode of writing was not in question.

Rex v. Ranger (Que.), 30 Can. Cr. Cas. 65 (annotated) 53 Que. S. C. 423.

RIGHT OF TRIAL JUDGE TO COMPARE.

It is competent for a Judge and jury to compare the handwriting of a disputed document with others which are in evidence in the cause and which are admitted or proven to be in the handwriting of the supposed writer. Quaere, whether a Judge can compare the handwriting of a disputed document, without the preliminary introduction of expert testimony with that of other documents introduced merely in the first instance for the purpose of comparison. [Per Stuart, J., citing Cobbett v. Kilminster, 4 F. & F. 490 and Rex v. Harvey, 11 Cox C.C. 546.] It is open to the trial Judge to make the comparison himself [per Beck, J., dissenting following Thompson v. Thompson, 4 O.L.R. 442].

Rohoel v. Darwish, 13 A.L.R. 180, [1918] 1 W.W.R. 627.

VIII. Confessions; testimony or evidence wrongfully obtained.

(See previous Annual Digests.)

IX. Admissions.

(§ IX—675)—WRITING.

Only complete admission of the party can replace the writing mentioned in art. 1235 C.C.

Burtner Coal Co. v. Gano Moore Co. and C.P.R., 24 Rev. Leg. 435.

ACKNOWLEDGEMENT OF LIABILITY—MASTER AND SERVANT—NEGLIGENCE.

The payment of hospital bills and money advances by an employer to his employees, who was the victim of an accident in the course of his work, does not constitute an acknowledgement of liability, but are merely acts of generosity and sympathy.

Botara v. Montreal Locomotive Works, 54 Que. S.C. 359.

X. Hearsay, declaration; res gestæ.

A. IN GENERAL; PEDIGREE; REPUTATION.

(§ X A—680)—STATEMENTS OF THIRD PERSON —NEGLIGENCE.

Evidence by a plaintiff as to statements made to him are admissible against him as proof of negligence by him, as establishing his knowledge of the existence of conditions he should have guarded against.

Stowe v. Grand Trunk Pacific R. Co. (Alta.), 39 D.L.R. 127, [1918] 1 W.W.R. 546.

F. ACTS AND DECLARATIONS OF FORMER PARTY IN INTEREST; TESTATOR OR FORMER OWNER.

(§ X F—720)—CONVENTIONAL LINE—ADMISSIONS BY PREDECESSOR IN TITLE—CROWN GRANT.

Evidence to support a conventional line should be clear and definite. Authority to assist in ascertaining the true line between the properties of adjoining owners will not extend to the establishment of a conventional line. Admissions by a predecessor in title of one of the parties as to an alleged conventional line constitute an element for consideration, and in a doubtful case may be a controlling factor, but cannot be considered where the true line has been satisfactorily proved. A plan attached to a grant from the Crown and referred to in it, is receivable in evidence for the purpose of locating the lines of the grant.

Lewis Miller & Co. v. Clow, 52 N.S.R. 1.

XI. Relevancy and materiality.

K. SIMILAR ACTS OR FACTS.

(§ XI K—837)—INTENT—ABORTION—PRIOR SIMILAR OFFENCES.

Where, in answer to a charge of using instruments to cause an abortion, the accused sets up in defence that the instruments were used to prevent septic poisoning in a miscarriage already begun, and he gives his own testimony to that effect, he becomes liable to be cross-examined as to alleged previous criminal acts similar to that alleged and performed in a similar manner, and, on his denial of same, to have his plea of innocent intent negatived by proof of the other similar criminal acts although these occurred two and four years previous to the offence charged. Such evidence would be admissible apart from any evidence of system, and if the defence does not develop until the defendant is in the witness box, he is to be given an opportunity of answering such rebuttal evidence by giving further evidence in sur-rebuttal. [See annotation on evidence of prior offences to rebut surgeon's justification in abortion charge, at end of this case.]

Brunet v. The King (annotated), 42 D.L.R. 405, 57 Can. S.C.R. 83, 30 Can. Cr. Cas. 16, affirming 27 Que. K.B. 481. [See also 30 Can. Cr. Cas. 9.]

MURDER—OTHER CRIMES.

The mere fact that the evidence tends to shew the commission of other crimes does not render it inadmissible if it is relevant to the issue before the jury, and it is relevant on a murder trial if it bears upon the question whether or not the shooting was in self-defence by shewing a chain of subsequent transactions by the accused from which the jury might infer that they were intended to cover up the disappearance of the deceased and his personal property.

Rex v. Letain (Man.), 29 Can. Cr. Cas. 389, 28 Man. L.R. 386, [1918] 1 W.W.R. 505.

CONSPIRACY—FRAUD.

It is a general principle of the law of evidence that the proof adduced must have direct connection with the question in issue. Therefore, in a plea to an action on an insurance policy the allegations that the insured had conspired with other persons to defraud, and made a business of defrauding

insurance companies in general, may be rejected on an inscription in law.

Glen Falls Ins. Co. v. Murcheson, 24 Rev. Leg. 342.

O. Contracts; breach; waiver.

(§ XI O—855)—Breach of promise.

In an action for breach of promise, evidence that third parties have made accusations against the plaintiff, or that conclusions derogatory to the plaintiff will be drawn from the fact of the breach, is not admissible.

D. v. B., 38 D.L.R. 243, 40 O.L.R. 112.

XII. Weight, effect, and sufficiency.

A. In general; corroboration.

(§ XII A—920)—Evidence of accomplice —Corroboration.

The corroboration which is necessary in the case of evidence of an accomplice should be made by evidence independent of that of the accomplice and which affects the prisoner by fastening or tending to fasten the crime on to him. There should be evidence which implicates the prisoner, i.e., which corroborates in some material particular not only that the crime was committed but also that the prisoner was guilty of it. It is not, however, necessary to produce as corroboration direct evidence that the prisoner committed the crime, it is sufficient to establish proof of circumstances that he had something to do with its perpetration.

Rex v. Dumont, 29 Can. Cr. Cas. 442, 54 Que. S.C. 9.

Forgery — Corroboration — Comparison of writings.

Evidence by comparison of writing should always be received by Courts with great circumspection. The criterion of the authenticity of the writing should consist above all things in the resemblance between the writings compared, in the general character of such writings and not in the way the letters are formed. The most efficacious means of establishing such general character is by witnesses who have seen the accused write when his way of writing was not questioned.

Le Roi v. Ranger, 53 Que. S.C. 423, 30 Can. Cr. Cas. 65 (Annotated).

(§ XII A—923)—Positive and negative.

In the estimation of the value of evidence in ordinary cases, the testimony of a credible witness who swears positively to a fact should receive credit in preference to that of one who testifies to a negative.

Hallett v. Bank of Montreal (N.B.), 43 D.L.R. 115.

E. As to property rights.

(§ XII E—945)—Agreement to give property to child—Consideration—Corroboration.

Proof of facts sufficient to make out an express agreement must be given in order to support a claim made by a son against the estate of his deceased father that the son was to have the property upon which the father resided as an inducement for the son to remain at home and work the property. Under the provisions of the Evidence Act, R.S.N.S. 1900, ch. 163, sec. 34, such agreement, assuming it to have been made, can not be enforced in the absence of corroborative evidence. Per Chisholm, J., (Ritchie, E.J., dubitante). The statement of the widow to the effect that "my husband told me often that he wanted W. to have the place" is not corroboration of the character required.

Re George Fraser, 52 N.S.R. 122.

L Criminal cases.

(§ XII L—986a)—Statement of child—Threat.

On an indictment for an indecent assault on a girl of 7 years of age, the answers given by the girl to questions put to her by her mother immediately on her return home after the assault, are properly admitted in corroboration of the girl's testimony. The mother's promise not to punish her if she told the whole truth is not an inducement to make the statement depriving it of being spontaneous.

Shorten v. The King, 42 D.L.R. 591, 57 Can. S.C.R. 118, [1918] 3 W.W.R. 5.

Testimony of stool-pigeons.

Whatever the opinion of the Court may be as to the use of stool-pigeons in securing convictions there is nothing to prevent a conviction being based on their evidence. The character of witnesses is a matter touching only the credibility of their testimony.

Rex ex rel Tiderington v. Rose (Alta.), [1918] 3 W.W.R. 950.

XIII. Admissibility under pleadings; variance.

See Trial; Pleading.

EXCHANGE.

Of lands, see Vendor and Purchaser.

Bills of exchange, see Bills and Notes; Cheques; Banks.

Warranty—Latent defect.

A party to an exchange of property cannot be held liable for a latent defect, which he has denied at the time of the exchange, but against which he expressly refused to guarantee.

Gauthier v. Gagnon, 53 Que. S.C. 224.

EXCHEQUER COURT.

See Courts; Crown; Expropriation.

EXECUTION.

I. In general.
II. Supplementary proceedings.

Annotations.

What property exempt from: 16 D.L.R. 6; 17 D.L.R. 829.

When superseded by assignment for creditors: 14 D.L.R. 503.

Stay of proceedings in actions by alien enemies: 23 D.L.R. 375.

As affected by moratorium: 22 D.L.R. 865.

I. In general.

Exemption from, see Exemptions.

(§ I—2)—Registration of writ—Land Titles Act—Transfer of writ—Renewal—Copy of judgment.

In order to bind the lands of an execution debtor the copy of a writ of execution or of a renewal of such writ, delivered to the registrar of land titles must be delivered to him by the sheriff and the words in sec. 149 (1) of the Land Titles Act "if a copy of such writ has not already been delivered or transmitted to the registrar" must be read as if they were followed by the words "by the sheriff or other duly qualified officer," the words "other duly qualified officer" meaning "other duly qualified officer acting in the capacity of sheriff." On the transfer of a writ of execution to a new district, unless a certified copy of the judgment is filed therein, the writ of execution when renewed can bind only the lands in the bailiwick of the sheriff by whom it was delivered to the registrar.

Re Land Titles Act (Sask.), [1918] 3 W.W.R. 90.

Subrogation—Costs—Attorney's fees.

A creditor subrogated to the rights of his debtor may, in his own name, cause a writ of execution to be issued against the debtor of his transferor; but he cannot include in the writ the costs of the attorneys distraining.

Prudential Trust Co. v. International Construction Co., 24 Rev. Leg. 257.

(§ I—7)—Error in return—Amendment.

The return by a sheriff to a writ of execution may, in general, be amended even after execution has been executed, and, in some cases, even though application for the amendment be not made by the sheriff himself [Lee v. Neilson, 14 U.C.R. 606; Bull v. King, 8 U.C.C.P. 474; Green v. Glassbroke, 132 E.R. 57, cited.] In an action against a sheriff for a false return to writs of execution, held that the case was a proper one in which to allow the return to be amended to conform to the facts.

Gault's Ltd. v. Christopherson (Sask.), [1918] 3 W.W.R. 898.

Judgment declaring right of plaintiff to future annual payments, but no direction for payment or recovery—Rule 533—Execution issued after accrual of payments set aside as irregular—Judgment entered in conformity with judgment pronounced—Supplementary order under rule 523 for payment of sums accrued—Effect of subsequent legislation and amendments to constitution of friendly society—5 Geo. V. ch. 30—7 Geo. V. ch. 99.

Grainger v. Order of Canadian Home Circles, 15 O.W.N. 125.

(§ I—8)—Lien—Subsequent lands.

In Alberta an execution against lands filed in the Lands Titles Office binds all lands of the debtor owned at the time of filing or subsequently acquired by him while the execution remains in force. [Per Beck and Hyndman, JJ., Harvey, C.J., and Stuart, J., contra, Lee v. Armstrong, 37 D.L.R. 738, followed.]

Robin Hood Mills v. Haimson (Harrison) (Alta.), 40 D.L.R. 328, [1918] 2 W.W.R. 58.

(§ I—9)—Partnership—Receiver—Priority.

Executions against the property of a partnership which were in the sheriff's hands prior to the date of the appointment of a receiver of the partnership assets, held not entitled to be satisfied in full in priority to executions, which did not reach the sheriff until after that date [Roach v. McLachlan, 19 A.R. (Ont.) 496; Edmonton Mortgage Co. v. Gross, 3 A.L.R. 500, distinguished].

Re Natural Gas, Light & Appliance Co., 13 A.L.R. 358, [1918] 1 W.W.R. 769.

Receiver — Equitable execution — Order to receive judgment debtor's share of estate of deceased person —Defendant executor and residuary legatee under will—Application for order for payment over—Unnecessary order—Transfer to another creditor of benefits under will.

Douglas v. Smart, 15 O.W.N. 141.

Sheriff's sale—Payment—Ownership.

The adjudication in a sheriff's sale being perfect only on payment of the price, the accrued income and revenue, before such payment belongs to the seized party.

St. Catherine St. Realty Co. v. Loranger, 19 Que. P.R. 307.

(§ I—11)—Order of Dominion Board of Railway Commissioners directing payment by railway company of sum representing part of cost of bridge —Dominion Railway Act, R.S.C. 1906, ch. 37, secs. 46, 56—Order made rule of Supreme Court—Writ of fi. fa. thereon—Motion to stay execution —Jurisdiction.

Re City of Toronto and Toronto R. Co., 43 D.L.R. 739, 42 O.L.R. 82. [See 42 O.L.R. 413, 14 O.W.N. 44.]

Costs— Execution for — Stay—Jurisdiction.

The Supreme Court of Canada gave judgment for the plaintiff for damages for deceit, ordered a reference as to the amount thereof with a direction that there should be a set-off of the amount due from the plaintiff to the defendant under a contract, and gave judgment unconditionally in favour of the plaintiff for costs. Held, that a Judge of the Supreme Court of British Columbia had no jurisdiction to order a stay of execution for the costs, pending the result of the reference. [Merchants Bank of Halifax v. Houston, 9 B.C.R. 158, followed].

Barron v. Kelley (B.C.), [1918] 3 W.W.R.

466. [See 41 D.L.R. 590, 56 Can. S.C.R. 455, [1918] 2 W.W.R. 131.]

STAY — OPPOSITION — INTERVENTION—PARTIES—HEIRS.

Where a judgment is executed on behalf of a plaintiff who has died since its rendition, and one of the defendants asks, by way of opposition, that the proceedings be suspended until the plaintiff's heirs have continued the suit, so that he may object by way of opposition to the irregularity of the seizure and the partial extinction of the debt, the plaintiff's heirs will be entitled to intervene in the case to contest the opposition. A proceeding by way of intervention is the only regular mode, inasmuch as judgment having been rendered there can be no continuance of suit.

Deuscher v. Cohen, 19 Que. P.R. 329.

II. Supplementary proceedings.

(§ II—15)—DISTRIBUTION—CREDITORS' RELIEF ACT—SHERIFF'S SALE OF LAND—PRIORITIES—COSTS.

Rogers Lumber Yards v. Stuart (Sask.), 39 D.L.R. 771.

CREDITORS' RELIEF ACT—SHERIFF'S SCHEME OF DISTRIBUTION—AMOUNT FOR WHICH EXECUTION CREDITOR ENTITLED TO RANK—CONTESTATION — EVIDENCE — INSOLVENT ESTATE—MONEYS IN HANDS OF TRUSTEE FOR CREDITORS NOT DEALT WITH IN SCHEME OF DISTRIBUTION.

Re Michaud and Larson, 14 O.W.N. 65.

EXECUTORS AND ADMINISTRATORS.

I. APPOINTMENT; RESIGNATION; REMOVAL.
II. POWERS AND LIABILITIES; CONDUCT OF ESTATE; ASSETS.
A. Rights, powers and duties.
B. Liabilities.
C. Assets.
III. SUITS AFFECTING ESTATE.
A. On behalf of.
B. Suits and judgments against.
IV. INDEBTEDNESS; DISTRIBUTION; ACCOUNTING AND SETTLEMENT.
A. Debts and obligation.
B. Instructions and control by Court.
C. Distribution; accounting; settlement; discharge.
V. CREDITOR'S RIGHTS AGAINST LAND; SALE OF LAND FOR DEBTS.
VI. FOREIGN EXECUTORS AND ADMINISTRATORS.
VII. EXECUTORS DE SON TORT.

Annotations.

Compensation: mode of ascertainment: 3 D.L.R. 168.

Status of alien enemies as: 23 D.L.R. 375, 380.

I. Appointment; resignation; removal.

(§ I—4)—ADMINISTRATOR OF NON-RESIDENT'S ESTATE — APPOINTMENT —JURISDICTION —ORIGINATING NOTICE.

Under rule 433 a Judge of the Supreme Court has jurisdiction on an application by way of originating notice to appoint the public administrator a trustee to administer a trust under a will of a person domiciled outside Alberta whereby real estate in Alberta is devised.

Re Leonard, 13 A.L.R. 241, [1918] 2 W.W.R. 222.

EXECUTOR AN EXTRA-PROVINCIAL COMPANY NOT LICENSED IN B.C.—POWER OF ATTORNEY TO MANAGER—RIGHT OF MANAGER TO BE APPOINTED ADMINISTRATOR —TRUST COMPANIES REGULATION ACT, R.S.B.C. 1911, CH. 43, SECS. 12, 14—ADMINISTRATION ACT, R.S.B.C. 1911, CH .4.

Re Henderson (B.C.), [1918] 3 W.W.R. 896.

ADMINISTRATION OF ESTATE—APPLICATION BY BENEFICIARY FOR ADMINISTRATION ORDER—RULE 612—REFUSAL OF APPLICATION.

Re Foy, 13 O.W.N. 451.

REPLACEMENT OF TESTAMENTARY EXECUTORS.

Although before the coming into force of the Civil Code the replacement of testamentary executors could not be left to the Judges, art. 924 C.C. (Que.), which allowed such replacement, applies to wills made before the Code. If the testator has expressed a desire that his testamentary executors be replaced judicially it may be so done.

Masson v. Bastien, 19 Que. P.R. 462.

II. Powers and liabilities; conduct of estate; assets.

A. RIGHTS. POWERS AND DUTIES.

(§ II A—24)—DELAY IN DISTRIBUTION—ORDER TO BORROW—SUCCESSION DUTIES.

An order authorizing executors to borrow a sufficient amount to pay succession duties, a small sum advanced by the executors, an existing mortgage on the property, and the executors' commissions up to the time of the application, on the security of a mortgage on the testator's property, is properly made where the distribution of the estate is delayed under the will.

Re Elliot, 40 D.L.R. 649, 41 O.L.R. 276.

BORROWING MONEY TO PAY DEBTS—RIGHTS OF LENDER—TRUSTEE ORDINANCE—SUBROGATION—TAXES AND FUNERAL EXPENSES.

Where a will does not, either expressly or impliedly, give power to the executors to borrow money the estate is not legally liable to a person who has lent money to the executors for the purpose of paying off debts of the estate [Farhall v. Farhall, L.R. 7 Ch. 123, followed]. Moreover, under the interpretation given by the Ontario decisions on the similar section of the Ontario Act from which the Trustee Ordinances, C.O. ch. 119, was copied and which must be followed here [see Ward v. Serrell, 3 A.L.R. 123; B. & R. Co .v. McLeod, 18 D.L.R. 245]. Sec. 44 of the Ordinance not only makes all creditors of an estate payable pari passu, but prevents an executor from preferring one creditor to

others; the Court cannot, therefore, order the repayment of money borrowed by the executors for the purpose of making payments contrary to said section. Nevertheless a lender whose money has been used for such purpose is entitled under the principles applied in McCullough v. Marsden, [1918] 3 W.W.R. 725, to be subrogated to the position of the creditors whose claims have been paid. In respect to money which has been applied to preferred claims, e.g., funeral expenses, or in keeping down charges upon the lands, e.g., taxes, the lender is entitled to be placed in the position which the executors would have held if they had paid them out of their own pockets; and in the case of taxes may properly be subrogated to the position of the taxing bodies and thus given a charge upon the lands.

Re Breckenridge Estate (Alta.), [1918] 3 W.W.R. 803.

B. Liabilities.

(§ II B—43) — Fraud — Purchase from cestui que trust—Limitations Act—Liability of executor—Accounts—Interest—Costs.

Under a will, the defendants, two of the four sons of the testator, were trustees of property which was vested in them, and was to be distributed among the four in equal shares, the distribution being left in the hands of the four individually, and not in the hands of the defendants as trustees and executors. The complaint of the plaintiff, one of the four, was that, certain residuary real estate having been apportioned in shares, the defendants, by fraud, obtained from the plaintiff a deed of his share, sold it to an innocent purchaser, and then laid out the proceeds in other land, on which they had made a profit. Held, affirming the finding of Riddell, J., the trial Judge, that no fraud or overreaching on the part of the defendants had been shewn. In the distribution, the homestead was conveyed to R., one of the defendants, and in the conveyance was included lot 2, which was not a part of the homestead, and was not mentioned by the defendants as part of R.'s share, and not noticed by the plaintiff when he signed the deed, which he did without reading it, although he was requested to read it. Held, that the defendants as to the division did not stand towards the plaintiff in a fiduciary relationship: they were bare trustees, bound to divest themselves of the legal estate in the way determined by the four; and were not brought within the rule against purchases from cestui que trust; but, assuming that they were trustees, they acted honestly and reasonably, and should, after the lapse of many years, have the benefit of secs. 46, 47 and 48 of the Limitations Act, R.S.O. 1914, ch. 75. And held, as to R., that, having got lot 2 as part of his share, and having sold it and received the proceeds, he should account personally to the plaintiff for his share thereof, were it not that the Limitations Act was a bar in his case also—there was no concealed fraud which prevented him from claiming the benefit of the statute. The plaintiff also claimed in this action to recover one quarter of the amount found by a Surrogate Court Judge to be in the hands of the defendants as executors. It appeared that the Judge had, in taking the accounts, allowed the parties for all the payments made by them during the father's lifetime in order to preserve the property, and had deducted the amount of these payments from the amount for which the executors were chargeable. Held, that the evidence before the Judge warranted this, and his approval was final and binding upon all the parties represented, except in so far as fraud or mistake might be shewn. [Re Wilson and Toronto General Trusts Corporation (1908), 15 O.L.R. 596, followed.] Held, also, that the plaintiff was entitled to bring an action upon the footing of these accounts just as if they were settled accounts, in case due payment was not made by the executors, or might make an application for an administration order if circumstances warranted that course. Held, therefore, varying the judgment of Riddell, J., that the plaintiff was entitled to judgment for his share of the moneys in the hands of the defendants, with such interest as the amount had borne since it was paid into Court in this action. Held, also, in view of the way in which the charge of fraud was persisted in, that the plaintiff should have no costs of the action, and the defendants should have their costs as executors out of the estate down to the date of the payment into Court, of which the share of the plaintiff should pay one quarter, and the plaintiff should pay the defendants' costs after the date of payment into Court, and that there should be no costs of the appeal. [Bruty v. Edmundson, [1917] 2 Ch. 285, [1918] 1 Ch. 112, referred to.]

Tyrrell v. Tyrrell, 43 O.L.R. 272; 14 O.W.N. 265, reversing in part 13 O.W.N. 105.

C. Assets.

(§ II C—55)—Assets of estate—Bank shares subject to "double liability"—Bank Act—Devastavit—Personal liability of administrators—Limitations Act—Liability of assets—Liability of next of kin—Transfers not recorded—Effect.

At the time of his death, M. was the holder of 14 shares of the capital stock of a bank, which was afterwards declared to be insolvent and ordered to be wound up. The shares passed to the administrators of M.'s estate, and were by them transferred to the next of kin, who accepted them as payments pro tanto of their shares in the estate, which was of the value of $10,000 over and above all liabilities. The shares were subject to the "double liability" declared by the Bank Act, 3 & 4 Geo. V. ch. 9, sec. 125 (D). Other assets, exceeding in value the amount of the liability upon the shares, were handed over to the next of kin; and the whole estate was thus distributed. The liquidator of the bank

sued the administrators and the next of kin for the amount of the "double liability." Held, that, when the administrators parted with the assets without providing for this liability, they were guilty of a devastavit, and so rendered themselves liable personally. They might have made proper transfers to those beneficially entitled, and then have retained the assets for sixty days, when, if the bank had not suspended, they would have been safe: sec. 130 of the Bank Act. But the Limitations Act afforded a defence to a claim as for a devastavit; for it constituted a new cause of action, and the action was not brought within six years from the time of the devastavit. (2) The administrators were not personally liable upon the shares: sec. 53 of the Bank Act. (3) The cause of action for the amount due upon the shares (the "double liability") was based upon contract, and the time did not begin to run until there was a call; and so the liability of the administrators as administrators was not barred, for that was the liability of the deceased and of his estate. And the liquidator should have judgment against the administrators for the amount of the calls, interest and costs, to be levied out of the goods, etc., of the intestate in the hands of the administrators, if any. [Thorne v. Kerr (1855), 2 K. & J. 54, followed.] (4) As against the beneficiaries, the cause of action was upon the contract also; the liability upon the shares first accrued when the call was made in 1912; and the Statute of Limitations afforded no defence. (5) The next of kin were, at the time of the liquidation, the beneficial owners of the shares, and had accepted the transfers to them, though the transfers were not recorded in the books of the bank. Sec. 43 of the Bank Act requires registration; but the transferees were, in equity, bound to protect the transferors, and ought to pay. Each beneficiary was, in this view, liable for the shares transferred to them. [Hardoon v. Belilios, [1901] A.C. 118, applied.] (6) In a wider view, each individual was liable to refund and pay to the creditor the amount due, to the extent of the assets received by such individual, which formed part of the intestate's estate. But this remedy should not be invoked until it was ascertained whether those who ought to pay could be made to pay as transferees of the shares.

Clarkson v. McLean, 42 O.L.R. 1.

RIGHT TO SELL—EXEMPTIONS ACT—CONFIRMATION OF SALE—ASSETS.

An administrator has no authority to dispose of property covered by sec. 5 of the Exemptions Act, R.S.S., ch. 47. A sale thereof which has been made by the administrator honestly and in good faith and is beneficial, may be confirmed, however, by the Court, whereon an order will be made for the payment of the proceeds to the widow and children.

Re Kolbe Estate; Standard Trusts Co. v. Kolbe, [1918] 3 W.W.R. 310, 11 S.L.R. 405.

DIRECTION FOR SALE OF PROPERTY TO PERSON NAMED—VENDOR'S LIEN.

Re Harris, 15 O.W.N. 31, 43 O.L.R. 476.

LIQUIDATION OF ESTATE—ACTS OF TRADE—ABANDONMENT.

Upon the death of a trader his quality of trader does not pass to his heirs with his estate. Acts done by the testamentary executors of a trader to realise the assets of the estate, to close up deals begun, to terminate contracts on hand, or to free the estate from onerous obligations, without any intention of profit, do not constitute acts of trade, nor render the testamentary executors liable to the provisions of the law concerning abandonment of property.

Henry v. Seaton, 54 Que. S.C. 289.

III. Suits affecting estate.

A. ON BEHALF OF.

(§ III A—65)—ACTION TO RECOVER DAMAGES FOR DEATH—FATAL ACCIDENTS ACT—TRUSTEE ACT.

Where the death of a person was occasioned, as alleged, by the negligence of the defendant, it was held, that an action by the administrator of the estate of that person to recover money paid for funeral expenses and "damages for the death" would not lie. The action could not be maintained under the Fatal Accidents Act, R.S.O. 1914, ch. 151, the relatives who survived the deceased not being within the limited class mentioned in sec. 4 (1). Nor could the action be brought by virtue of sec, 41 of the Trustee Act, R.S.O. 1914, ch. 121, which is intended to prevent the wrongdoer escaping liability by reason of the death of the person injured, and does not create a new right of action. Before that enactment, the death of a person injured from any cause put an end to the action—Actio personalis moritur cum personâ. Even if that maxim is now abolished, save as to actions of libel and slander, as said in Mason v. Town of Peterborough (1893), 20 A.R. 683, 685, 686, the principle that, in a civil Court, the death of a human being cannot be complained of as an injury, laid down in Baker v. Bolton (1808), 1 Camp. 493, and affirmed in Admiralty Commissioners v. S.S. Amerika, [1917] A.C. 38, remains untouched.

England v. Lamb, 42 O.L.R. 60.

IV. Indebtedness; distribution; accounting and settlement.

A. DEBTS AND OBLIGATIONS.

(§ IV A—75)—INSOLVENT ESTATE OF INTESTATE — CREDITORS' CLAIMS — PAYMENT PARI PASSU WHETHER CREDITORS DOMESTIC OR FOREIGN.

Re Scatcherd, 15 O.W.N. 222.

C. DISTRIBUTION; ACCOUNTING; SETTLEMENT; DISCHARGE.

(§ IV C—100)—EXPENDITURES—REPAIRS—APPORTIONMENT.

The burden of expenditures made by executors for repairs and improvements of a

permanent character, made in order to procure a tenant for the property, should be apportioned between capital and income in accordance with the rule in In re Freman, [1898] 1 Ch. 28, 33. [Brereton v. Day, [1895] 1 I.R. 518; Re Smith; Bull v. Smith (1901), 84 L.T.R. 835, followed.]

Re Elliot, 40 D.L.R. 649, 41 O.L.R. 276.

SETTLEMENT—APPROVAL OF COURT.

National Trust Co. v. Matheson, 15 O.W.N. 32.

(§ IV C—107)—RELEASE OF, UNDER SEAL—LIMITATIONS ACT.

A release under seal executed by a beneficiary of an interest in remainder, discharging an executor from all accounting and demands, converts the interest in remainder into an interest in possession, and in the absence of fraud the Limitations Act (R.S.O. 1914, ch. 75, sec. 47) begins to run from the date of the release.

Lees v. Morgan, 39 D.L.R. 259, 40 O.L.R. 233, 12 O.W.N. 353, reversing 11 O.W.N. 222.

DISCHARGE OF EXECUTOR.

Where all the heirs have sold and transferred their shares of the estate to the universal usufructuary legatee, with the exception of one particular legatee, and no distribution or winding up of the estate is necessary; and where the executor testamentary and administrator in trust has refused to do acts necessary for the administration of the property, the office of the executor is ended, and he can be relieved from his function.

Keon v. McNally, 54 Que. S.C. 95.

(§ IV C—110)—REMUNERATION—COMMISSION—DISBURSEMENTS.

Remuneration to trustees, of a percentage of the gross value of the estate, should be allowed on the gross value as of the time when the accounts are passed, a valuation should then be made by the registrar of the unrealised assets and the percentage based on that valuation. Trustees who have been allowed a commission to manage the estate will not be allowed as a disbursement, commissions paid to agents on collection of interest of mortgages in which some of the estate moneys were invested.

Stephen v. Miller (B.C.), 40 D.L.R. 418, [1918] 2 W.W.R. 1042.

V. Creditor's rights against land; sale of land for debts.

See Wills; Execution.

VI. Foreign executors and administrators.

(See previous Annual Digests.)

VII. Executors de son tort.

(See previous Annual Digests.)

EXEMPTIONS.

From taxation, see Taxes, I F.

Annotation.

What property is exempt: 16 D.L.R. 6; 17 D.L.R. 829.

EXPERT TESTIMONY.

See Evidence.

Annotations.

Medical experts: 38 D.L.R. 453.

Questioned documents and proof of handwriting: 44 D.L.R. 170, 13 D.L.R. 565.

EXPROPRIATION.

I. RIGHT TO TAKE PROPERTY.
- A. In general.
- B. Who may exercise.
- C. What may be taken.
- D. For what purpose.
- E. Right acquired.

II. PROCEDURE.
- A. In general.
- B. Petition.
- C. Trial; award.
- D. Appeal; new trial.

III. RIGHTS AND REMEDIES OF OWNERS.
- A. In general.
- B. What constitutes a taking of, or injury to, property.
- C. Right to compensation.
- D. Payment or security; taking possession of property.
- E. Consequential injuries.

IV. ADDITIONAL SERVITUDE.
- A. In general; on railroad way.
- B. On highway.

Annotation.

Allowance for compulsory taking, liquor license: 27 D.L.R. 250.

I. Right to take property.

A. IN GENERAL.

(§ IA—4)—MUNICIPAL ACTS—IMPROVEMENTS—SETTING ASIDE.

When a municipal council passes a by-law for the expropriation of land, ostensibly acting within the powers conferred by sec. 576 of the Municipal Act, 1903, purports to act in pursuance of a well thought out and comprehensive scheme for the acquisition of parks, pleasure grounds, boulevards, drives, gardens and places of recreation and enjoyment; when the propriety of the scheme has been generally approved, and has not been attacked by a single ratepayer as such, has been acted upon and money expended in pursuance of it for many years, and when each plot of land is essential to the harmonious development of the whole, such by-law will not be set aside at the instance of an owner of lots expropriated and included in the scheme who has been an active and zealous pioneer for the acquisition and construction of such improvements, especially when there is no evidence of fraud, dishonesty or trickery on the part of such council. The erroneous introduction of unnecessary words cannot destroy a description otherwise clear.

Watson v. Toronto Harbour Commissioners, 41 D.L.R. 633, 42 O.L.R. 65.

C. What may be taken.

(§ I C—16)—Beach—Harbour—Validity of grant — Compensation — Value—Public lands.

The right to alienate part of the public domain by the King of France has always been recognised even subsequent to the Edict of Moulins. A title to certain beach lots, in Quebec, founded on a grant from Louis XIV. is perfectly good and valid, and cannot be attacked by the Crown. Furthermore, such lands do not form part of the Harbour of Quebec. (2) In estimating compensation for the expropriation of land by the Crown, the value of the property for expropriation purposes cannot be taken as a basis; the value of the property to the owner, not to the party expropriating it, is to be considered.

Belanger v. The King, 42 D.L.R. 138, 17 Can. Ex. 333.

II. Procedure.

A. In general.

(§ II A — 84) — Description — Curative statute — Constitutionality — Jus tertii.

No title passes to land taken under an expropriation proceeding in which the statutory requirements as to the description of the land are not complied with. The curative provisions of Act 1881 (R.S.C. 1906, ch. 36, sec. 82) only apply where the lands are taken possession of. Where the Dominion Parliament has power to authorize the expropriation of provincial lands for a Dominion railway, it has the like power to enact a curative statute relieving nunc pro tunc for a non-compliance with the strict provisions of the statute under which the expropriation is made.

The King v. Lee, 38 D.L.R. 695, 16 Can. Ex. 424.

III. Rights and remedies of owners.

B. What constitutes a taking of, or injury to, property.

(§ III B—110)—Conversion of rights—Compensation — Companies — Action —Parties—Market value—Special adaptability—Railways.

By virtue of sec. 8 of the Exchequer Court Act, the deposit of the plan and description of the land expropriated has the effect of vesting the property in the Crown, and from such time, under sec. 28 of the Act, the compensation money stands in lieu of the land, and any claim to the land is converted into a claim for the compensation money. (2) A corporation holding the shares of a subsidiary company has no locus standi to prosecute a claim for compensation on behalf of the latter; the action of the subsidiary company must be brought in its own corporate name. (3) The special adaptability of land for railway purposes is but an element of the market value of the land. In assessing compensation for the taking of such land regard must be had of its value to the owner, not the value to the taker. The doctrine of reinstatement does not apply to the taking of lands not used as a going manufacturing concern. The best test of the market value is what other properties in the neighbourhood have brought when acquired for similar purposes.

The King v. Quebec Gas Co. and City of Quebec, 42 D.L.R. 61, 17 Can. Ex. 386. [Affirmed by Supreme Court of Canada, May 7, 1918.]

(§ III B—115)—Municipal Act—Arbitration to fix compensation.

An arbitration under the provisions of the Municipal Act (R.S.O. 1914, ch. 192) in regard to compensation for land expropriated is had only to fix the amount of the compensation after which, with a knowledge of the price that must be paid if the land be taken, the municipality may proceed or withdraw in the manner and under the circumstances set out in the Act; an award is binding and conclusive as to the price to be paid if the land is finally taken and as to that only.

Re Toronto and Grosvenor St. Presbyterian Church Trustees, 40 D.L.R. 574, 41 O.L.R. 352, reversing 40 O.L.R. 550. [Affirmed by Supreme Court of Canada.]

C. Right to compensation.

(§ III C—135)—Water lots—Valuation—Riparian rights—Damages—Loss of access—Right of way.

The Crown, having expropriated some water lots in the outskirts of Halifax, N.S., for the purposes of Halifax Ocean Terminals, it sought by an information to have determined the amount of compensation. Held, that in the absence of any sales of similar property in the neighbourhood from which the value of the property could be ascertained, a valuation of seven and a half cents per square foot was a fair basis of compensation, adding thereto a 10% allowance for the compulsory taking; that the owners were also entitled to damages for the depreciation of property not expropriated, occasioned by the loss of access to the water-front for boating and bathing purposes, and of a right of way they enjoyed over a railway, as a result of the expropriation.

The King v. Brenton, 42 D.L.R. 373, 18 Can. Ex. 138.

City—County—Statutory rights—Abandonment of property.

The rights of the County of York to damages for expropriation by the City of Toronto of the Toronto and York Radial R.W. Co. and all its real and personal property within the city are statutory under the Act of 1897, and are not affected by the fact that by a by-law the county has abandoned certain roads over which the line is operated to minor municipalities of the county.

Re City of Toronto and Toronto and York Radial R. Co. and County of York, 43 D.L.R. 49, 42 O.L.R. 545.

Measure of damages—Easement.

In fixing the amount of compensation by

arbitration in respect of an easement expropriated by a power company, under authority conferred on it by the Dominion Statute incorporating it (2 Edw. VII. ch. 107, sec. 21 (c)), the damage or depreciation caused by the possession and potential use of the power to expropriate is to be included in the award.

Re Coleman and Toronto and Niagara Power Co., 38 D.L.R. 65, 40 O.L.R. 130.

WHARF—POSSESSORY TITLE—RIGHT OF WAY —LOSS OF PROFITS.

It being undisputed that the suppliant was entitled to compensation for the expropriation of a wharf and for the deprivation of the right of way to and from the wharf over the railway tracks; the suppliant was, under the circumstances of the case, entitled to compensation for such expropriation and for the deprivation of the right of way; but the loss of business not affected by the taking of the wharf, or the loss of profits in connection with a business in anticipation but not actually embarked on, were not elements of compensation.

Maxwell v. The King, 40 D.L.R. 715, 17 Can. Ex. 97.

SPECIAL ADAPTABILITY—VALUATION.

On an expropriation of lots specially adapted for warehouse purposes the same value per square foot does not attach to small lots as to larger lots. The owners are entitled to an allowance for the compulsory taking in addition to the value of the land.

The King v. Vassie & Co.; Joseph Allison; Prudential Trust Co.; Petrie Manufacturing Co., 40 D.L.R. 306, 17 Can. Ex. 75.

GRAVEL LANDS—VALUE.

In an expropriation of gravel lands by the Crown the basis of compensation is the true or fair market value of the property as a whole; the value to the owner, not the value to the Crown expropriating it, is to be considered. The amount awarded may be allowed to go to a mortgagee.

The King v. Thomas Nagle, 40 D.L.R. 266, 17 Can. Ex. 88.

FARM—TIMBER LAND—VALUATION.

The basis of compensation for the expropriation of farm or timber lands by the Crown for training camp purposes is the market value of the property as a whole at the time of expropriation, as shewn by the prices other farms had brought when acquired for similar purposes.

The King v. Bowles, 41 D.L.R. 254, 17 Can. Ex. 482. [Affirmed by Supreme Court of Canada, December 11, 1916.]

TOTAL OR PARTIAL ABANDONMENT—JURISDICTION OF EXCHEQUER COURT.

Under sec. 23 of the Expropriation Act (R.S.C. 1906, ch. 143) the Exchequer Court has jurisdiction to adjudicate upon claims arising out of a total as well as partial abandonment of the land expropriated. The claim for compensation arises on the original expropriation and is not defeated by the subsequent proceedings, even after revesting the claim for compensation still remains open for adjustment. The Court, in assessing the amount, should take into consideration the fact of the abandonment, together with all the other circumstances of the case. The measure of the right should not be treated as something in the nature of a claim for damages for disturbing or injuriously affecting the value of the property.

The King v. Gibb; Gibb v. The King, 42 D.L.R. 336, [1918] A.C. 915, 119 L.T. 586, reversing 27 D.L.R. 262, 52 Can. S.C.R. 402.

HYDRO-ELECTRIC POWER COMMISSION—STRIP OF LAND TAKEN FOR TRANSMISSION LINE —5 GEO. V. CH. 19, SEC. 5 (O.)—COMPENSATION OF LAND-OWNER—PROPER METHOD OF ASCERTAINMENT—AWARD OF ARBITRATOR — FINDINGS — EVIDENCE— —APPEAL—UNDERTAKING TO ERECT AND MAINTAIN FENCE.

Re Hydro-Electric Power Commission of Ontario and Porter Estate, 15 O.W.N. 19.

(§ III C—140)—EASEMENT—DAMAGES— PROSPECTIVE PROFITS.

One who has acquired the easement of laying pipes for an aqueduct and sewers upon certain lands, part of which are afterwards expropriated by the Crown has no estate or interest in the lands taken. All he is entitled to is value of the piece of aqueduct expropriated and the value of the easement upon the same.

Ruel v. The King, 38 D.L.R. 613, 16 Can. Ex. 214.

CANAL—RIPARIAN RIGHTS—VIEW—WATER.

Upon an expropriation of land by the Crown for the enlargement of a canal, compensation will not be allowed for an obstruction of view to property fronting thereon, by earth left piled up in the course of construction not necessarily incidental to the expropriation nor for the loss of the use of the canal for watering purposes, to which there are no riparian rights as such in the ordinary sense.

The King v. Farlinger, 39 D.L.R. 107, 16 Can. Ex. 381.

VALUE OF LANDS—VALUE TO OWNERS— SPECULATIVE VALUE.

The value of lands agreed to be conveyed by the Crown under an agreement for complete reinstatement of the owners of a gas and electric plant site expropriated by the Crown is not the value to the grantors, but to the owners, who are entitled to compensation according to the terms of the agreement only. No allowance will be made for the speculative value of the land expropriated, or for the additional value of the old site in regard to the increased cost of erection of buildings or of cost of operation.

The King v. Halifax Electric Tramway Co., 40 D.L.R. 184, 17 Can. Ex. 47.

CROWN GRANT—RESERVATIONS—ABANDONMENT—ADVANTAGES.

In an expropriation by the Crown of lands held under a Crown grant subject to a reservation in favour of the Crown of the

right to retake the lands if required for public purposes, the owners are entitled to have their rights duly adjusted without fixing the actual value of the rights remaining in the Crown under the grant and want of registration does not affect the validity of the conditions or reservations. Where expropriation has been abandoned, but no legal rights are invaded and no damage suffered, compensation cannot be allowed; all advantages to the property by the construction of a railway crossing are to be taken into consideration in estimating the amount of compensation.

Fugere v. The King, 40 D.L.R. 51, 17 Can. Ex. 1.

FIXING COMPENSATION—GENEROSITY—10% ALLOWANCE.

Generosity is not an element which should enter into the arbitrator's or Judge's consideration, when fixing the compensation to be allowed for compulsory purchase. An additional allowance of 10% of the award for the compulsory taking will not be allowed where the circumstances which justify such allowance do not exist.

The King v. Larivée, 42 D.L.R. 151, 56 Can. S.C.R. 376.

VALUE OF LAND—SPECULATIVE PURCHASE—10% ALLOWANCE.

In assessing compensation for property taken under compulsory powers, it is not proper to treat the value to the owner of the land and rights, as a proportional part, the value of the realized undertaking proposed to be carried out. The proper basis of compensation is the amount for which the property could have been sold had the proposed undertaking by the Crown not been in existence, with the possibility that the Crown or some other person might obtain those powers. The price the property brought from purchasers speculating upon the expropriation affords no proper mode for arriving at its market value, and having been acquired for such speculative purposes, the usual 10% allowance for the compulsory taking will be refused.

The King v. Picard, 17 Can. Ex. 452.

MARKET VALUE—RIGHT TO STREET—TITLE—REVERSION.

For purposes of compensation lands must be assessed as of the date of the expropriation, at their market value, in respect of the best uses to which they can practically and economically be put, taking into consideration any prospective capabilities. The best criterion of the market price is the price at which property in the neighbourhood changes hands in the ordinary course of business. Mere interference with a public right to travel upon a street, the person claiming compensation therefor not having the fee or any predial rights therein, is not an element of compensation. A reversionary right in favour of a vendor of the land materially affects the value of the land itself, as compared with land the title to which is free of any encumbrances.

The King v. Carrieres de Beauport Cie, 17 Can. Ex. 414.

WATER LOTS—RIPARIAN RIGHTS—ACCESS.

A riparian owner on the foreshore of a tidal and navigable water has the right to the water for domestic purposes, also the right of access and exit to and from his property, which are elements of value in estimating compensation for the expropriation of lots by the Crown.

The King v. Duncan, 17 Can. Ex. 433.

FARM — VALUE — MILL — TIMBER—CONVERSION.

In estimating the amount of compensation for the expropriation of a farm by the Crown for the purposes of a military training camp, the property is to be valued, not by segregating the acreage in severalty, so much for the timber and other things thereon, but by the prices paid for similar properties when acquired for similar purposes, and its value accordingly at the time of expropriation. The owner, however, will not be allowed compensation for a mill erected and operated upon the land after the expropriation, and he is answerable to the Crown, in conversion, for all timber cut and removed by him after that time.

The King v. Thompson, 18 Can. Ex. 23.

INDUSTRIAL OR AGRICULTURAL LANDS.

Lands in the vicinity of what promises to become a railway junction have a higher value than that of land for agricultural purposes, and are to be valued as land of the industrial or building class, in estimating the amount of compensation for their expropriation by the Crown.

The King v. Quebec Improvement Co., 18 Can. Ex. 35.

VALUATION—QUANTITY SURVEY METHOD.

The "quantity survey method" does not apply to the valuation of farm property as the basis of compensation in an expropriation thereof by the Crown. The best guide is the market value of the property as a whole, as shewn by the prices of similar properties in the immediate neighbourhood when acquired for similar purposes.

The King v. Griffin, 18 Can. Ex. 51.

SEVERANCE—FARM—ACCESS.

Where the most serious damage from the severance of a farm, resulting from an expropriation by the Crown, is removed by the latter's undertaking to provide sufficient means of access across the expropriated property, compensation must be assessed in view of such undertaking.

The King v. Cote, 18 Can. Ex. 58.

VALUE—PROSPECTIVE CAPABILITY.

In estimating the amount of compensation for the expropriation of land by the Crown the prospective capabilities of the property or its speculative value cannot be taken into consideration. The compensation should be

measured by the prices paid for similar properties in the immediate neighbourhood.

The King v. Blais and Vadeboncoeur, 18 Can. Ex. 63.

RESIDENTIAL PROPERTY—VALUATION.

The re-instatement principle cannot be taken as the basis of compensation for residential property expropriated for a public work; nor can the prospective value of the property arising from the construction of the work be taken into consideration. The best guide is the selling value of similar property in the locality.

The King v. Blais, Vadeboncoeur and Blouin, 18 Can. Ex. 67.

WATER LOTS—VALUE—SUMMER RESORT.

In estimating compensation for the expropriation of water-front property by the Crown for the purpose of harbour fortifications, mere prospects of developing the property into a summer resort cannot be taken into consideration in arriving at its true market value.

The King v. Davis and Findlay, 18 Can. Ex. 72.

INTERFERENCE WITH BUSINESS—GOOD-WILL.

In awarding compensation for the compulsory taking of land by the Crown, a fair allowance will be made in respect of the interference with the owner's business as a going concern, small as the good-will of such business may be.

The King v. Jalbert and Quebec Harbour Commissioners, 18 Can. Ex. 78.

EFFECT OF ABANDONMENT—ADVANTAGES—SET-OFF.

An abandonment by the Crown ,under sec. 23 of the Expropriation Act, of part of the land taken for a public work, must be taken into account in assessing compensation therefor; and any benefit or advantage accruing from the construction of the public work must likewise, under sec. 50 of the Act, be taken into account and consideration given to it by way of set-off.

The King v. Bannatyne and Vokes, 18 Can. Ex. 82.

(§ III C—143)—MINERALS—QUARRY OF ROCK.

The words "or other minerals" used in sec. 133 of the Ontario Railway Act (R.S.O. 1914, ch. 185) do not include the ordinary rock of the district; where a quarry of such rock has a special value, such value should be included by arbitrators in fixing the amount of compensation for land expropriated. [Imperial Acts, also Great Western R. Co. v. Carpalla United China Clay Co., [1910] A.C. 83, North British R. Co. v. Budhill Coal Co., [1910] A.C. 116, Caledonian R. Co. v. Glenboig, [1911] A.C. 290, Symington v. Caledonian R. Co., [1912] A.C. 87, considered.]

Re McAllister and Toronto and Suburban R. Co., 39 D.L.R. 207, 40 O.L.R. 252, 22 Can. Ry. Cas. 272.

(§ III C—144)—WATER LOT—CROWN GRANT—HARBOUR—CROWN DOMAIN—PRESCRIPTION.

The Crown, by instituting expropriation proceedings in respect of a water lot, elects not to exercise a right of resumption for purposes of public improvement reserved to it in a Crown grant of such lot. Such right being vested in the Quebec Harbour Commissioners, under (1859) 22 Vict., ch. 32, notwithstanding their public character and the nature of their trust does not form part of the Crown domain. Under art. 2242 C.C. such right was extinguished by lapse of time, it not having been exercised during the thirty years following its acquirement by the Harbour Commissioners (per Brodeur and Lavergne, JJ.).

Power v. The King, 42 D.L.R. 387, 56 Can. S.C.R. 499, reversing 34 D.L.R. 257, 16 Can. Ex. 104.

WATER LOTS—BASIS OF VALUATION—MUNICIPAL ASSESSMENT — ADVANTAGES — WHARF.

The basis or starting-point for the valuation of water lots, expropriated by the Crown for the purpose of wharf improvements, may be had from a municipal assessment of the property, taking into consideration the higher assessable value of the land owing to its location, and the advantage afforded to the owners as a result of the improvements.

The King v. Hudson's Bay Co., 42 D.L.R. 181, 17 Can. Ex. 441.

WATER LOTS—VALUATION—ADVANTAGES—SET-OFF.

In estimating the amount of compensation upon the expropriation of water lots by the Crown for harbour improvement purposes, regard will be had to the local market value of the land, its state of improvement respecting water frontage, and the advantage and benefit accrued to the owners as a result of the undertakings, the latter of which, under sec. 50 of the Exchequer Court Act, must be considered by way of set-off.

The King v. Bradburn, 42 D.L.R. 168, 17 Can. Ex. 447.

(§ III C—157)—LEASE—RIGHTS OF OWNER—RIGHTS OF LESSEE.

On expropriation of a portion of leased land the owners are entitled to compensation for the land taken and for injurious affection to the remainder without regard to the special use of the land; the lessees are entitled to compensation for interference to business and necessary expenses of removing to another site. [See annotation, 1 D.L.R. 508.]

The King v. Montgomery-Campbell and Northfield Coal Co., 40 D.L.R. 147, 17 Can. Ex. 32.

"PERSON INTERESTED"—LESSEE—EXPIRATION OF LEASE — RENEWAL — FUTURE RIGHTS.

A lessee whose lease expired several weeks after a company had deposited its plans and given the general notice of expropriation

mentioned in R.S.C., ch. 37, secs. 191 to 194 (Railway Act), is not a "person interested" as therein mentioned. He is merely an occupant with a precarious title, who can be expelled from the land to be expropriated, without his having any remedy in compensation or damages against the company. After a company has deposited its plans, profiles and book of reference, and given the general notice for the purpose of expropriation, the owner cannot grant any future right upon the property or renew the lease to the detriment of the company.

Marleau v. Cedars Rapids Mfg. & Power Co., 24 Rev. Leg. 1.

(§ III C—158)—COMMUNITY PROPERTY—WILL—AGREEMENT OF SALE—MORTGAGE—PRESCRIPTION.

In an expropriation of land by the Crown for training camp purposes, held, that land acquired by a testator during his married life being community property could only be disposed of by him to the extent of his interest therein, and those claiming under the will were entitled to compensation therefor to no greater extent; that the testator's wife having died intestate, half of the community went to her children, who were entitled to compensation accordingly. A purchaser of such land, who has resold it to the Crown, is only entitled to compensation according to the terms of the agreement of sale, but not to damages for the compulsory taking; nor will compensation be allowed for mortgages or hypothecs which have become prescribed. The amount recovered being greater than the amount offered, interest was allowed from the date of expropriation.

The King v. Berry, 41 D.L.R. 345, 17 Can. Ex. 462.

D. PAYMENT OR SECURITY; TAKING POSSESSION OF PROPERTY.

(§ III D—160)—DEPOSIT—FEES—GOVERNMENT TAX—"OTHER REASONS"—HYPOTHECARY CLAIMS.

In an expropriation under the Expropriation Act of Quebec, the City of Montreal, which deposited in Court the amount of the compensation instead of paying it directly to the owner, should pay the fee of 1% fixed by art. 113 of the tariff, as well as the percentage of 1% to the government (12 Vict. ch. 112, sec. 4), even in a case where the city had obtained from the owner an extension of the delay for making the payment on condition that the amount of the compensation was deposited in Court. The words "other reasons" in art. 7599, R.S.Q., mean reasons of the nature of an hypothecary claim such as a rent, a dower, an open substitution and, other obstacles resulting from some hypothec, and which prevent, like those in art. 7599 the payment of the moneys into the hands of the claimant. So long as the creditor has not accepted the consignment, or so long as a judgment which can no longer be appealed has not declared such a consignment good and valid, its effects as to the extinction of the obligation and its accessories are neither final nor similar to a payment, and the consigned moneys remain in the debtor's assets.

Dufresne v. City of Montreal, 53 Que. S.C. 337, 24 Rev. de Jur. 161.

ARBITRATION — APPEAL — PAYMENT — INTEREST—POSSESSION—MUNICIPAL AND SCHOOL TAXES.

When there is an appeal from an arbitration award under R.S.C., ch. 37, sec. 209, in an expropriation by a railway company, the judgment given upon such appeal is final, and in such case the action brought by the company to set aside the award does not deprive the person whose land was expropriated of his right to demand payment of his indemnity. The interest upon the indemnity in such an expropriation runs from the date of the actual taking of possession of the land expropriated by the company; and such possession only follows upon registration of the plan and notice of expropriation. These may, nevertheless, be exacted after a formal demand, when the final demand takes place only by action to record the indemnity, it runs only from the notice of action. As long as the company is not in possession of the land expropriated, it is not bound to pay the municipal and school taxes imposed upon such real estate.

Lachine, Jacques-Cartier and Maisonneuve R. Co. v. Charlebois, 27 Que. K.B. 47.

E. CONSEQUENTIAL INJURIES.

(§ III E—165)—BUILDING LOTS—LOSS OF ACCESS.

An expropriation of building lots by the Crown does not entitle the owner to special damages for the depreciation in value to the remainder of the lots because of their being cut off from the proposed extension of a public street, the losses, if any, being offset by the advantages.

The King v. Torrens, 40 D.L.R. 108, 17 Can. Ex. 19.

IV. Additional servitude.

(See previous Annual Digests.)

EXTENSION OF TIME.

See Moratorium.
For appeal, see Appeal, III F.

EXTRA WORK.

Recovery for, building contracts, see Contracts.

EXTRADITION.

I. INTERNATIONAL.
II. WITHIN BRITISH EMPIRE.

I. International.

(§ I—1)—SEVERAL OFFENCES.

An extradition charge may include more than one offence. [Re O'Neill, 19 Can. Cr. Cas. 410, 5 D.L.R. 646, followed.]

State of New York v. Israelowitz, '29 Can. Cr. Cas. 323, 25 B.C.R. 143.

(§ I—3)—Breaking parole—Fugitive.

A person from another country who has broken his parole in that country, where he has been convicted of obtaining money under false pretences, may be extradited as a fugitive under sec. 18 of the Extradition Act, R.S.C. 1906, ch. 155, although breaking parole is not an extraditable offence. [See also The King v. Hall, 42 D.L.R. 330.]

United States of America v. Allison (N.S.), 42 D.L.R. 595.

Trial—Identical offence.

An extradited person is to be tried for the offence only with which he is charged in the extradition proceedings and for which he was delivered up; this does not cover a distinct offence, though of a similar character, to which the evidence before the foreign extradition commissioner was not directed and which was not included in the charges on which extradition was demanded, although the foreign extradition warrant stated the offence in general terms which might include either of the transactions.

Buck v. The King, 38 D.L.R. 548, 55 Can. S.C.R. 133, 29 Can. Cr. Cas. 45, [1917] 3 W.W.R. 117, reversing 35 D.L.R. 55, 27 Can. Cr. Cas. 427.

(§ I—4) — On foreign indictment — Foreign law.

Where extradition is demanded to answer a foreign indictment for larceny, proof of which indictment is made before the extradition Judge, and the facts disclose an offence which would be an extraditable crime under Canadian law, it may be inferred from the fact of the indictment in the demanding State that such facts constitute larceny under the State law. [Re Deering, 24 Can. Cr. Cas. 133, 24 D.L.R. 818, applied.]

State of New York v. Israelowitz, 29 Can. Cr. Cas. 323, 25 B.C.R. 143.

Provincial laws—Evidence Act—Judicial notice of foreign laws.

The provincial laws of evidence are applicable to extradition proceedings by virtue of the Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 35, where not inconsistent with federal laws; and in an extradition case in Manitoba the provincial statute R.S.M. 1913, ch. 65, sec. 32, enables the extradition tribunal to take judicial notice of the laws of any part of the United States of America. (Per Cameron, J.A., Perdue, J.A., concurring, in a divided Court on affirming the decision of Curran, J.)

Re Rosenberg (Man.), 29 Can. Cr. Cas. 309, 28 Man. L.R. 439, [1918] 1 W.W.R. 845.

(§ I—6)—Extraditable offences—Forgery—Description.

When a requisition for the crime of forgery is amended by changing the offence to that of "uttering forged paper," also extraditable, and the fugitive is surrendered for the latter offence, his right not to be tried for any other crime or offence than for the one extradited has not been violated; the warrant of surrender is conclusive as to the offence charged, and the offence therein is sufficiently described if set out in the general words of the extradition treaty.

Re Hall (N.S.), 39 D.L.R. 551. [See 42 D.L.R. 330.]

Validity of warrant of surrender.

A prisoner having been surrendered to the Canadian Government for a crime covered by the treaty between Great Britain and the United States; the Court has no power to challenge the validity or regularity of the warrant of surrender, issued by authority of the Government of the United States nor has it any right to go behind the said warrant to inquire whether the proceedings upon which it is founded are or are not regular; although it may examine the proceedings abroad to see that a surrender has not been obtained on one charge, and then another or different crime laid and prosecuted in Canada.

The King v. Hall (N.S.), 42 D.L.R. 330. [See Re Hall, 39 D.L.R. 551.]

Good faith of proceedings.

On a demand for extradition the accused is not entitled to adduce evidence that the extradition proceedings are not being taken in good faith. (Per Cameron, J.A., Perdue, J.A., concurring, in a divided Court.) [Re McTier, 17 Can. Cr. Cas. 80, disapproved; R. v. Delisle, 5 Can. Cr. Cas. 210, distinguished.]

Re Rosenberg, 29 Can. Cr. Cas. 309, 28 Man. L.R. 439, [1918] 1 W.W.R. 845.

(§ I—7)—Judge signing depositions—Stenographer's certificate — Evidence—Admissibility.

The omission of the extradition Judge to himself sign the depositions, even if the signature by a duly sworn shorthand reporter is not alone sufficient, will not invalidate the order of committal for extradition. (Per Cameron, J.A., Perdue, J.A., concurring, in a divided Court, on dismissing a motion to discharge.) Where evidence is taken in the demanding country and the depositions are received by the extradition Judge under sec. 16 of the Extradition Act, Can., the admissibility of the matter contained in the depositions depends on the foreign law of evidence which it is to be assumed was rightly administered; the extradition Judge need not enter into an enquiry as to whether certain formalities had been taken which would have been a pre-requisite in a proceeding taken under Canadian law. (Per Cameron, J.A., Perdue, J.A., concurring, in a divided Court.) [Re Harsha, 10 Can. Cr. Cas. 430, and Re Zossenheim, 20 T.L.R. 121, considered.]

Re Rosenberg, 29 Can. Cr. Cas. 309, 28 Man. L.R. 439, [1918] 1 W.W.R. 845.

(§ I—8)—Extraditable offences—Larceny—False pretences.

If the crime for which extradition is asked is a crime against the law of both countries and is in substance to be found in the treaty, although under different heads, effect is to

be given to the claim for extradition, so where the offence is larceny under the foreign law but in Canada is only obtaining money or goods by false pretences, which is likewise an extraditable crime, a committal for extradition on a charge of stealing will stand.

Ex parte Thomas, 38 D.L.R. 716, 45 N.B.R. 148, 28 Can. Cr. Cas. 396.

(§ I—9)—Identity of accused—Photograph.

The identity of the accused in an extradition proceeding founded on a foreign indictment may be shewn by the production of a photograph of the accused verified in the foreign proceedings; the extradition Judge may compare such photograph with the features of the prisoner before him and from such comparison conclude that the prisoner is the identical party who was indicted.

State of New York v. Israelowitz, 29 Can. Cr. Cas. 323. 25 B.C.R. 143.

II. Within British Empire.

(§ II—15)—Fugitive Offenders Act—Warrant of arrest.

A Canadian magistrate hearing a demand for extradition to another part of the British Empire under the Fugitive Offenders Act, 44-45 Vict., Imp., ch. 69 (R.S.C. 1906, ch. 154), may legally issue a provisional warrant for the apprehension of the fugitive on the sworn information of some credible person, if in his discretion he sees fit to do so; and this although the information was upon information and belief only; but if he considers it desirable or necessary he may require the evidence of other witnesses. [R. v. Harsha, 11 Can. Cr. Cas. 62, referred to.] An information under the Fugitive Offenders Act, Imp., should disclose the charge with sufficient certainty to enable the accused to know what he is charged with; but an information is not bad on a charge of obtaining money by false pretences in that two surnames are used conjointly without any Christian names to indicate the defrauded party, and without indicating whether or not the names represent a partnership or corporation or merely two individuals.

Rex v. Harrison (B.C.), 29 Can. Cr. Cas. 420.

FACTORS.

See Brokers; Principal and Agent.

FACTS.

Review of, see Appeal.

FALSE ARREST.

See False Imprisonment; Arrest; Malicious Prosecution.

FALSE IMPRISONMENT.

See Malicious Prosecution; Arrest.

Annotation.

False arrest; Reasonable and probable cause; English and French law compared: 1 D.L.R. 56.

FALSE PRETENCES.

Annotation.

False pretences; Crim. Code, sec. 404: 34 D.L.R. 521.

(§ I—6)—Distinguished from theft.

The offence is false pretences and not theft when goods are obtained from the owner on a worthless cheque fraudulently drawn by the purchaser in a fictitious name, as the owner consented to the property and possession going to the purchaser whom he knew under no other name than the fictitious one.

Rex v. Illsley (No. 1) (N.S.), 29 Can. Cr. Cas. 105. [See 41 D.L.R. 130, 29 Can. Cr. Cas. 107.[

Sale of another's automobile.

A person who obtains a quotation of a price for a motor-car from the owner thereof and without making any payment or obtaining any legal right or title thereto, offers it for sale as his own while still held in the possession of the true owner, and as a part of the pretended sale transaction obtains money on the faith of his ability to make delivery and give a title to the car, is properly convicted of obtaining money by false pretences through the medium of a contract (Cr. Code, sec. 405).

Rex v. Provost (Que.), 29 Can. Cr. Cas. 247.

FALSE REPRESENTATIONS.

See Fraud and Deceit.

As ground for rescission, see Contracts; Vendor and Purchaser; Sale.

In obtaining insurance, see Insurance.

FARM CROSSINGS.

See Railways.

FARM IMPLEMENTS ACT.

See Sale.

FATAL ACCIDENTS ACT.

See Death; Negligence; Master and Servant: Lord Campbell's Act.

FEE SIMPLE.

See Deeds; Wills, III.

FEES.

See Costs; Sheriff; Levy and Seisure.

Attorney's fees, see Solicitors.

FELLOW-SERVANTS.

See Master and Servant.

FENCES.

See Railways; Boundaries.

Adjoining owners — Construction and maintenance—Jurisdiction of land inspector.

Under art. 505, C.C. (Que.), every proprietor may require his neighbour to construct, at common expense, a fence dividing their properties. The division of the fence, to which each of the proprietors has a right under this article, can only be made by agreement between proprietors interested,

and, in default of agreement, by a land inspector. Such division cannot result from the construction and maintenance, for more than 30 years, of a definite part of the fence, as in such a case it cannot take effect from a right of ownership, but simply from a right of servitude, which cannot be acquired without title. Where the land inspector has jurisdiction to divide a line fence, or make a new division, he must divide the whole fence and not a part only. One who complains that the line fence has not been legally divided, or that the original division has, for any reason, become unfair, cannot claim to maintain the status in quo for one part only and repudiate it for the other. Held, in the absence of evidence of any agreement or municipal ordinance, the change which the plaintiff has made in operating his land, a change which he had the absolute right to make, entitled him to apply to the land inspector to have the fence divided, but the latter acted irregularly in dividing only a portion of the fence, namely the four arpents of the low ground, and under those circumstances the Court cannot give effect to such proceedings and to such a division.

Poirier v. Ladouceur, 24 Rev. de Jur. 117.

FIDUCIARY RELATIONS.

See Principal and Agent; Brokers.

Of trustees, see Trusts.

Between attorney and client, see Solicitors.

Of corporate directors, see Companies.

FIERI FACIAS.

See Execution.

FILING.

See Registry Laws; Chattel Mortgages; Bills of Sale; Mechanics' Liens; Land Titles; Pleading.

FINDINGS.

See Trials; New Trial.

Review of findings, see Appeal.

FINE.

See Summary Convictions; Certiorari; Criminal Law.

FIRES.

(§ I—1)—Highway—Liability of foreman for acts of subordinates.

The foreman of a gang of workmen engaged in building a government road, who authorises a subordinate to kindle a fire on the road for the purpose of making tea for the gang, is liable, even though the starting of the fire was not an unlawful act, for injury to adjoining property through the negligent failure of the workmen to extinguish the fire after the tea was made.

Bigras v. Tasse, 38 D.L.R. 651, 40 O.L.R. 415.

FISHERIES.

Annotation.

Public right of fishing in tidal waters; the 3 mile limit: 35 D.L.R. 28.

(§ I B — 5) — Municipal regulation — License—Mandamus.

The right of a riparian owner or occupant under ch. 18 of the Nova Scotia Statutes 1912, as amended in 1916, to receive a license from the municipal authorities for an exclusive fishing right, upon tendering the statutory license fee, is absolute, and cannot be destroyed by municipal regulation; the issue of the license may be compelled by mandamus.

Archibald v. The King, 39 D.L.R. 166, 56 Can. S.C.R. 48, affirming 35 D.L.R. 560, 51 N.S.R. 549.

FIXTURES.

(§ II—12)—Safety deposit boxes—Intention.

If an intention to make chattels part of the freehold is sufficiently established from all the circumstances of the particular case, they may be held to be part of the freehold, notwithstanding that they are not affixed otherwise than by their own weight to the freehold.

Dominion Trust Co v. Mutual Life Ass'ce Co.; B.C. Securities v. Mutual Life Ass'ce Co. (B.C.), 43 D.L.R. 184, [1918] 3 W.W.R. 415.

(§ III—15)—Theatre chairs — Conditional sale—Lien.

Theatre chairs sold under a lien agreement, whereby the vendor retains the ownership and possession until paid for, affixed permanently to the floor of the theatre, with the vendor's knowledge and consent, become part of the realty. A purchaser of realty is not bound to search for liens against goods which, under the law, have become part of the realty.

Berlin Interior Hardware Co. v. Colonial Investment and Loan Co., 38 D.L.R. 643, 11 S.L.R. 46, [1918] 1 W.W.R. 378.

(§ IV—20)—Building—Landlord and tenant.

A house not attached to the land upon which it rests is a chattel, not part of the realty. A provision between the owner of land and the builder of a house thereon, that the latter may remove the house, is not a mere license, but an essential part of a lease of the land.

Devine v. Callery, 38 D.L.R. 542, 40 O.L.R. 505.

FORECLOSURE.

See Mortgage; Vendor and Purchaser.

As affected by moratorium, see Moratorium.

Annotations.

Effect of moratorium on foreclosure actions: 22 D.L.R. 865.

Remedies of alien enemies affected by war: 23 D.L.R. 375.

FOREIGN COMMISSION.

See Depositions; Discovery.

FOREIGN JUDGMENT.

See Judgment.

FORFEITURE.

See Contracts; Sale; Vendor and Purchaser.

FORGERY.

Annotations.

Offence of forgery under the Criminal Code: 32 D.L.R. 512.

Law relating to questioned documents and proof of handwriting: 44 D.L.R. 170; 13 D.L.R. 565.

(§ I—5) — INDICTMENT — DESCRIBING THE OFFENCE.

A conviction on an indictment for forging a cheque on a bank is not bad by reason of the indictment charging that the forged cheque was one "made" by the person whose name was signed without authority, instead of describing the cheque as "purporting to be made" by him. The indictment sufficiently charged the crime of forgery to conform with Cr. Code secs. 852 and 853 as to stating the substance of the offence, and it was open to the prosecution to shew that the forgery consisted of making a false document (Cr. Code sec. 335 (j)) and not by altering a genuine document (Cr. Code sec. 466 (2)). [R. v. Stevens, 5 East 244, 102 E.R. 1063, distinguished.]

Rex v. Illsley (N.S.), 41 D.L.R. 130, 29 Can. Cr. Cas. 107. [See 29 Can. Cr. Cas. 105.]

FORMER JEOPARDY.

See Criminal Law.

FORTUNE-TELLING.

Annotation.

Pretended palmistry: 28 D.L.R. 278.

FRANCHISES.

See Street Railways; Municipal Corporations, II.

FRAUD AND DECEIT.

As to subscription for shares, see Companies.

In application for insurance, see Insurance.

Of agent, see Principal and Agent; Brokers.

As ground for rescission, see Contracts; Sale; Vendor and Purchaser.

Annotations.

Rescission of contract for fraud or misrepresentation: 21 D.L.R. 329.

Share subscription obtained by fraud or misrepresentation: 21 D.L.R. 103.

Rescission of contract for fraud and damages for deceit: 32 D.L.R. 216.

(§ I—1) — MISREPRESENTATION — ACTIONABILITY.

Misrepresentation, even if it amounts to what is called legal fraud, is not sufficient to found an action for deceit; actual fraud must be proven. [Derry v. Peek, 14 App. Cas. 337, referred to.]

Bank of Toronto v. Harrell, 39 D.L.R. 262, 55 Can. S.C.R. 512, [1917] 2 W.W.R. 1149, reversing 31 D.L.R. 440, 23 B.C.R. 202.

(§ II—7)—NAME WRONGFULLY DISPLAYED ON BUSINESS SIGN.

A former employee, who commences business for himself, has no right to use a sign which is calculated to deceive the public into believing that the business of his former employer is being carried on in the premises.

Beatty v. Mansfield, 42 D.L.R. 678, 54 Que. S.C. 145.

(§ IV—17)—ABSENCE OF HONEST BELIEF.

In an action for deceit the plaintiff must prove actual fraud. The essential fact to be found to constitute fraud is the absence of an honest belief in the truth of the statements made. The deception of the plaintiff through the misrepresentations of the defendant is not sufficient, however honest and reasonable his conclusions may be as to the defendants' knowledge and belief. [Derry v. Peek (1889), 14 App. Cas. 337, followed.]

Devall v. Gorman, 42 D.L.R. 573, 13 A.L.R. 557, [1918] 3 W.W.R. 221. [Reversed by Supreme Court of Canada.]

(§ VIII—35)—MISREPRESENTATION— SALE OF SHARES—EVIDENCE—DAMAGES FOR DECEIT—DELIVERY UP OF PROMISSORY NOTE.

Hawley v. Hand, 15 O.W.N. 170.

FRAUDULENT CONVEYANCES.

I. IN GENERAL.
II. CONSIDERATION.
III. PREFERENCES; SECURITY.
IV. NOTICE; RIGHTS AND LIABILITIES OF PURCHASER.
V. RESERVATION OF INTEREST; CHANGE OF POSSESSION.
VI. TRANSACTIONS BETWEEN RELATIVES.
VII. SUBSEQUENT CREDITORS.
VIII. REMEDIES.

Annotations.

Deeds; conveyance absolute in form; creditor's action to reach undisclosed equity of debtor: 1 D.L.R. 76.

Right of creditors to follow profits: 1 D.L.R. 841.

I. In general.

(See previous Annual Digests.)

II. Consideration.

See Contracts; Deeds.

III. Preferences; security.

See Assignment for Creditors.

(§ III—10)—MORTGAGE—SURETY.

A creditor holding security from a surety cannot by any dealing to which the surety is not a party change or prejudice the position of the surety without discharging him; but

when a creditor holds other security which he is bound to retain for the benefit of the surety, he does not discharge the surety by improper dealing with or by releasing the security, but the surety is then entitled to a credit upon the account for the true value of the security improperly released. [Taylor v. Bank of New South Wales (1886), 11 App. Cas. 596, followed.]

Union Bank of Canada v. Makepeace, 38 D.L.R. 361, 40 O.L.R. 368, reversed in 15 O.W.N. 179.

DELIVERY OF GOODS — CONTRACT — GOOD FAITH.

The delivery by a merchant, during a few months prior to his failure, of goods whose price had been advanced to him by the vendee for the express purpose of enabling him to procure them, does not constitute a fraudulent preferential payment, but a delivery in execution of a contract. Fraudulent acts are voidable, but they are not void from absolute nullity. Consequently, it is not sufficient to ask, in the petition of an action to set aside a fraudulent conveyance, that the transaction alleged fraudulent be declared fraudulent, illegal and void; it is necessary to ask expressly for its voidance.

Lefaivre v. Vermette, 53 Que. S.C. 27.

IV. Notice; rights and liabilities of purchaser.

(See previous Annual Digests.)

V. Reservation of interest; change of possession.

(See previous Annual Digests.)

VI. Transactions between relatives.

(§ VI—30)—CONVEYANCE OF LAND BY HUSBAND TO WIFE—FRAUD UPON CREDITORS—EVIDENCE—FINDINGS OF FACT OF TRIAL JUDGE.

Hassard v. Allen, 15 O.W.N. 16, affirmed in 15 O.W.N. 131.

ACTION BY EXECUTION CREDITORS OF HUSBAND TO SET ASIDE CONVEYANCES OF LANDS MADE BY HUSBAND TO WIFE—EVIDENCE—BELIEF OF BOTH PARTIES THAT WIFE TRUE OWNER—DEMAND BY WIFE FOR CONVEYANCES—RULE AS TO VOLUNTARY CONVEYANCES—EVIDENCE—DISMISSAL OF ACTION—COSTS.

Bank of Montreal v. Stair, 15 O.W.N. 146.

VII. Subsequent creditors.

(See previous Annual Digests.)

VIII. Remedies.

(§ VIII—40)—ACTION TO SET ASIDE—EVIDENCE — INTENT — KNOWLEDGE OF GRANTEE — CLAIMS OF CREDITORS — COSTS — INTEREST — OPPRESSIVE BARGAIN—FINDINGS OF FACT OF TRIAL JUDGE—APPEAL.

McNairn v. Goodman, 14 O.W.N. 97, affirming 12 O.W.N. 374.

ACTION TO SET ASIDE—STATUS OF PLAINTIFF—SECURED CREDITOR—ADEQUACY OF SECURITY—HUSBAND AND WIFE.

Dolson v. Jones, 15 O.W.N. 53.

FREIGHT CARRIERS.

See Carriers, III.

FUGITIVE FROM JUSTICE.

See Extradition.

GAMING.

See also Lottery.

As affecting validity of contract, dealing on margins, see Contracts, III D; Brokers, I.

Annotations.

Lottery offence under Criminal Code: 25 D.L.R. 401.

Betting house offences: 27 D.L.R. 611.

Use of automatic vending machines for gambling: 33 D.L.R. 642.

(§ I—2) — FAN-TAN — CLUB — DISORDERLY HOUSE.

Fan-tan is a mixed game of chance and skill, and when it is played in a club with others than members participating in the game and a rake-off is taken to the uses of the club from their winnings in like manner as from the winnings of members, the place is a disorderly house within Cr. Code secs. 226A and 229. [R. v. Brady, 10 Que. S.C. 539, applied; R. v. Riley, 26 Can. Cr. Cas. 402, 30 D.L.R. 584, 23 B.C.R. 192, distinguished.]

Rex v. Ham, 29 Can. Cr. Cas. 431, 25 B.C.R. 237.

KEEPING GAMING HOUSE—PLAYING CARDS.

Evidence that defendant was proprietor of a pool room and that he and others remained there after hours for the purpose of playing the game of chance known as poker, and that in the course of the game money was deposited in a box known as a "kitty" and used in part in paying for refreshments supplied by defendant, held sufficient to support a conviction for keeping and maintaining a disorderly house, to wit, a common gaming house.

The King v. Bertrand, 52 N.S.R. 127.

GARAGE.

See Automobiles.

GARNISHMENT.

I. WHEN GARNISHMENT LIES.
  A. In general, before recovery of judgment.
  B. Against whom.
  C. What subject to garnishment.
  D. Situs of debts.
II. EFFECT; RIGHTS, DUTIES, AND LIABILITIES OF GARNISHEE.
  A. In general.
  B. Duty as to exemptions; effect of failure to set up.
  C. Effect of judgment.
  D. Effect of payment.
  E. Priorities.
III. PROCEDURE.

See also Attachment; Execution; Levy and Seizure.

I. When garnishment lies.

(§ I A—1)—ALLEGATIONS—AGREEMENT.

Where an agreement is to purchase an entire property and the statement of claim shews that the first payment was payable only on delivery of the transfer, no cause of action is shewn upon which a garnishee summons can be issued until the statement of claim alleges that a transfer had been delivered or tendered.

Goose Lake Grain Co. v. Wilson, 40 D.L.R. 271, 11 S.L.R. 163, [1918] 2 W.W.R. 311.

METHOD OF EXECUTING.

Seizure by garnishment cannot have the effect of putting into the hands of the garnishee goods which the defendant possesses in his own name.

Robertson v. Guilbault, 54 Que. S.C. 343.

B. AGAINST WHOM.

(§ I B—12a)—ASSIGNEE—CREDITORS TRUST DEEDS ACT.

An assignee for the benefit of creditors appointed under the provisions of the Creditors Trust Deeds Act (R.S.B.C., 1911, ch. 13) is an officer of the Court, and subject to the summary jurisdiction of the Court; his duty is to distribute the money in his hands in a particular way, and no debt is created which can be the subject-matter of attachment against him as garnishee.

Hoyes v. Fraternal Order of Eagles, 39 D.L.R. 516, 24 B.C.R. 505, [1918] 1 W.W.R. 873.

C. WHAT SUBJECT TO GARNISHMENT.

(§ I C—15)—RENT—EFFECT OF ASSIGNMENT.

An attaching order does not bind prior assigned rent unless such assignment is proved to be invalid because made with intent to defeat, delay or hinder creditors or to give an unjust preference. [Barnett v. Eastman (1898), 67 L.J.Q.B. 517, followed.]

Holliday v. Bank of Hamilton, 38 D.L.R. 128, 40 O.L.R. 203.

RENT DUE FROM GOVERNMENT.

Rent due from the government of Manitoba is subject to garnishment under s. 2 of the Garnishment Act, ch. 77, R.S.M. 1913.

Elliott v. Forrester (Man.), [1918] 2 W.W.R. 220.

OF FUNDS IN BANK.

A bank cannot be garnisheed for an unascertained sum accruing due, and payable to it on behalf of a customer already indebted to the bank, when only the happening of certain contingencies will make the bank owe a portion of the money when paid to the customer.

Rat Portage Lumber Co. v. Harty, 39 D.L.R. 425, 40 O.L.R. 322, 13 O.W.N. 33, affirming 12 O.W.N. 211.

PENSION—TORONTO POLICE BENEFIT FUND —ACT RESPECTING BENEVOLENT, PROVIDENT AND OTHER SOCIETIES, R.S.O. 1897 CH. 211, SEC. 12—ONTARIO COMPANIES ACT, 7 EDW. VII. CH. 34—INSURANCE ACT, SEC. 33.

Bell v. Bell, 15 O.W.N. 24.

WORKMEN'S COMPENSATION—COSTS—ATTORNEY'S FEES.

The compensation granted by the Workmen's Compensation Act not being transferable or seizable, a garnishment by the attorneys of the employer, for their costs, will be set aside upon an inscription in law.

Manchuck v. Rubber Regenerating Co., 19 Que. P.R. 371.

II. Effect; rights, duties, and liabilities of garnishee.

A. IN GENERAL.

(§ II A—35)—DECLARATION OF GARNISHEE—ABSENT CREDITOR.

A seizing creditor, who is absent at the time of the declaration of the garnishee, will not be allowed to compel the garnishee to appear again and produce his books, statements and documents, when the declaration is clear and exact.

Bastien v. Davis, 20 Que. P.R. 213.

WAGES—RETENTION.

An employer, who permits an employee whose wages have been seized to pay himself from the moneys he collected and so frustrates the one who attached them, will, if he does not deposit the seizable portion of the wages earned by the debtor since the seizure, be condemned as a personal debtor of the seizing creditor.

Garand v. Kastner, 20 Que. P.R. 268.

RIGHT OF RETENTION—LIEN.

A garnishee has a right of retention on the effects of the debtor which he has in his possession and on which he has a lien. Such right of retention may be opposed to third parties. A garnishee having a right of retention may contest the garnishment made in his hands, but if he does not contest it he may retain the effects given as security until he is disinterested.

Gingras v. Maher, 53 Que. S.C. 289.

DISCHARGE OF GARNISHEE—DEFAULT.

A garnishee has the right, on the day following the date on which the writ of garnishment should have been returned, to ask to be discharged of the writ by default.

Ballantyne v. Currie, 19 Que. P.R. 141.

WIFE AS GARNISHEE—AUTHORIZATION.

If a wife separate as to property is summoned as garnishee, her husband must be summoned to authorize her. A married woman cannot, on her default of appearing, be condemned as personal debtor in a summons of garnishment issued against her husband; but the creditors must produce evidence of the husband's claim against his wife.

Appleton v. Reynolds, 20 Que. P.R. 28.

C. Effect of judgment.

(§ II C—45)—Transfer of judgment—Renunciation—Service.

A transfer of a judgment, or a written renunciation to the judgment, made by one plaintiff in favour of his co-plaintiffs, cannot be set up against a garnishment after judgment issued by another creditor, if such transfer or renunciation has not been served either on the seizing party or on the garnishee.

Paquette v. Labelle, 24 Rev. Leg. 501.

D. Effect of payment.

(§ II D—50)—Debts—Payment into Court by garnishee—Payment out to sheriff for distribution—Creditors Relief Act, R.S.O. 1914, ch. 81, sec. 5 (2)—Rule 594—Form 79—Practice.

Imperial Bank of Canada v. Boyd, 14 O.W.N. 230.

E. Priorities.

(§ II E—55)—Salary—Deposit in Court—Subsequent attachment.

The voluntary execution of a judgment by a defendant who complies with the provisions of art. 1147 (a) of C.C.P. renders him exempt from any further seizure upon his wages, whether the attachment issues from the Circuit Court or from any other tribunal.

Paquet v. Saint-Laurent, 53 Que. S.C. 32.

III. Procedure.

(§ III—60)—Lacombe law—Deposit—Award of costs.

A defendant who has taken advantage of art. 1147a, C.C.P. (Lacombe Law), has not the right to make only one deposit at the office of the clerk of the Circuit Court and then to continue depositing directly with his employer; if he does so, his other creditors may issue against him a writ of garnishment after judgment. The fact that a creditor has caused garnishment after judgment to be issued, for an amount greater than that due him, does not render the seizure void, the only right the debtor has is to contest the seizure and obtain a reduction to the amount actually due. Although such seizure included costs due to attorneys ad litem, the latter have the right to sue in the plaintiff's name.

Ouimet v. Fleury, 24 Rev. Leg. 254.

The provisions of the Lacombe Act, art. 1147, C.C.P. (Que.), cannot be opposed to a seizure by garnishment after judgment, when the debtor made his deposits irregularly, e.g., when earning $120 to $140 a month he deposited only from $10 to $15 a month.

Giroux v. Martin, 24 Rev. Leg. 195.

(§ III—61)—Affidavit—Defect.

When an affidavit for a garnishee summons does not comply with r. 648 (Alta.), there is no jurisdiction to issue the summons; it is not a defect which can be cured under rule 273. [Mohr v. Parks, 3 A.L.R. 252, followed.]

Beaubier v. Lloyd, 39 D.L.R. 439, 13 A.L.R. 47, [1918] 1 W.W.R. 772.

GIFT.

I. In general.
II. Causa mortis.
III. Delivery.

Annotation.

Necessity for delivery and acceptance of chattel: 1 D.L.R. 306.

I. In general.

See Trusts; Wills; Deeds.

II. Causa mortis.

(§ II—10)—Parent and child—Gift or loan—Intention—Evidence—Documents—Will.

On the 8th July, 1913, the testatrix lent her daughter a sum of money; and on that day two documents were executed. By the first, signed by the daughter, she acknowledged the receipt of the sum "as a loan to be used as a first payment upon the house . . . I also hereby agree to pay you interest . . . half-yearly, and further agree that the said loan is to be a lien upon my equity in the said house, until paid or otherwise satisfied, but repayment of said loan is not to be demanded of me so long as I pay interest, and provide for the aforesaid lien, or give equivalent security satisfactory to you." By the second document, signed by the testatrix, she declared that, notwithstanding any testamentary disposal of her estate, the sum lent to her daughter "is hereby given to her absolutely and unconditionally for her own use, benefit, and disposal, and . . . the said gift . . . is not to be considered a part of my estate or subject to any condition of my will." No interest on the loan was ever paid. The testatrix died in March, 1917. By her will, her daughter was appointed one of her executors. The two documents were found enclosed in an envelope with this endorsement: "In the event of my death, this envelope is to be delivered, unopened, to my daughter:"—Held, the intention to give being plain and absolute, being communicated to the donee, and continuing until the death of the testatrix, that "donatio in præsenti tradenda in futuro" was shewn, and that the daughter was not a debtor to her mother's estate in respect of the sum lent or interest thereon. [Re Goff (1914), 111 L.T.R. 34, followed. Strong v. Bird (1874), L.R. 18 Eq. 315; Re Innes, [1910] 1 Ch. 188, considered.]

Re Barnes, 42 O.L.R. 352.

Gift inter vivos—Minor—Acceptance—"Ascendants"—Illness of donor—Will—Validity—Acquiescence.

The words "other ascendants" used in arts. 303 and 789 C.C. (Que.), relating to the acceptance of a gift to a minor, ought to be

I. When garnishment lies.

(§ I A—1)—Allegations—Agreement.

Where an agreement is to purchase an entire property and the statement of claim shews that the first payment was payable only on delivery of the transfer, no cause of action is shewn upon which a garnishee summons can be issued until the statement of claim alleges that a transfer had been delivered or tendered.

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Method of executing.

Seizure by garnishment cannot have the effect of putting into the hands of the garnishee goods which the defendant possesses in his own name.

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B. Against whom.

(§ I B—12a)—Assignee—Creditors Trust Deeds Act.

An assignee for the benefit of creditors appointed under the provisions of the Creditors Trust Deeds Act (R.S.B.C., 1911, ch. 13) is an officer of the Court, and subject to the summary jurisdiction of the Court; his duty is to distribute the money in his hands in a particular way, and no debt is created which can be the subject-matter of attachment against him as garnishee.

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C. What subject to garnishment.

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An attaching order does not bind prior assigned rent unless such assignment is proved to be invalid because made with intent to defeat, delay or hinder creditors or to give an unjust preference. [Barnett v. Eastman (1898), 67 L.J.Q.B. 517, followed.]

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Rent due from government.

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Pension—Toronto Police Benefit Fund—Act respecting benevolent, provident and other societies, R.S.O. 1897 ch. 211, sec. 12—Ontario Companies Act, 7 Edw. VII. ch. 34—Insurance Act, sec. 33.

Bell v. Bell, 15 O.W.N. 24.

Workmen's compensation—Costs—Attorney's fees.

The compensation granted by the Workmen's Compensation Act not being transferable or seizable, a garnishment by the attorneys of the employer, for their costs, will be set aside upon an inscription in law.

Manchuck v. Rubber Regenerating Co., 19 Que. P.R. 371.

II. Effect; rights, duties, and liabilities of garnishee.

A. In general.

(§ II A—35)—Declaration of garnishee—Absent creditor.

A seizing creditor, who is absent at the time of the declaration of the garnishee, will not be allowed to compel the garnishee to appear again and produce his books, statements and documents, when the declaration is clear and exact.

Bastien v. Davis, 20 Que. P.R. 213.

Wages—Retention.

An employer, who permits an employee whose wages have been seized to pay himself from the moneys he collected and so frustrates the one who attached them, will, if he does not deposit the seizable portion of the wages earned by the debtor since the seizure, be condemned as a personal debtor of the seizing creditor.

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Right of retention—Lien.

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Gingras v. Maher, 53 Que. S.C. 289.

Discharge of garnishee—Default.

A garnishee has the right, on the day following the date on which the writ of garnishment should have been returned, to ask to be discharged of the writ by default.

Ballantyne v. Currie, 19 Que. P.R. 141.

Wife as garnishee—Authorization.

If a wife separate as to property is summoned as garnishee, her husband must be summoned to authorize her. A married woman cannot, on her default of appearing, be condemned as personal debtor in a summons of garnishment issued against her husband; but the creditors must produce evidence of the husband's claim against his wife.

Appleton v. Reynolds, 20 Que. P.R. 28.

C. Effect of judgment.

(§ II C—45)—Transfer of judgment—Renunciation—Service.

A transfer of a judgment, or a written renunciation to the judgment, made by one plaintiff in favour of his co-plaintiffs, cannot be set up against a garnishment after judgment issued by another creditor, if such transfer or renunciation has not been served either on the seizing party or on the garnishee.

Paquette v. Labelle, 24 Rev. Leg. 501.

D. Effect of payment.

(§ II D—50)—Debts—Payment into Court by garnishee—Payment out to sheriff for distribution—Creditors Relief Act, R.S.O. 1914, ch. 81, sec. 5 (2)—Rule 594—Form 79—Practice.

Imperial Bank of Canada v. Boyd, 14 O.W.N. 230.

E. Priorities.

(§ II E—55)—Salary—Deposit in Court—Subsequent attachment.

The voluntary execution of a judgment by a defendant who complies with the provisions of art. 1147 (a) of C.C.P. renders him exempt from any further seizure upon his wages, whether the attachment issues from the Circuit Court or from any other tribunal.

Paquet v. Saint-Laurent, 53 Que. S.C. 32.

III. Procedure.

(§ III—60)—Lacombe law—Deposit—Award of costs.

A defendant who has taken advantage of art. 1147a, C.C.P. (Lacombe Law), has not the right to make only one deposit at the office of the clerk of the Circuit Court and then to continue depositing directly with his employer; if he does so, his other creditors may issue against him a writ of garnishment after judgment. The fact that a creditor has caused garnishment after judgment to be issued, for an amount greater than that due him, does not render the seizure void, the only right the debtor has is to contest the seizure and obtain a reduction to the amount actually due. Although such seizure included costs due to attorneys ad litem, the latter have the right to sue in the plaintiff's name.

Ouimet v. Fleury, 24 Rev. Leg. 254.

The provisions of the Lacombe Act, art. 1147, C.C.P. (Que.), cannot be opposed to a seizure by garnishment after judgment, when the debtor made his deposits irregularly, e.g., when earning $120 to $140 a month he deposited only from $10 to $15 a month.

Giroux v. Martin, 24 Rev. Leg. 195.

(§ III—61)—Affidavit—Defect.

When an affidavit for a garnishee summons does not comply with r. 648 (Alta.), there is no jurisdiction to issue the summons; it is not a defect which can be cured under rule 273. [Mohr v. Parks, 3 A.L.R. 252, followed.]

Beaubier v. Lloyd, 39 D.L.R. 439, 13 A.L.R. 47, [1918] 1 W.W.R. 772.

GIFT.

I. In general.
II. Causa mortis.
III. Delivery.

Annotation.

Necessity for delivery and acceptance of chattel: 1 D.L.R. 306.

I. In general.

See Trusts; Wills; Deeds.

II. Causa mortis.

(§ II—10)—Parent and child—Gift or loan—Intention—Evidence—Documents—Will.

On the 8th July, 1913, the testatrix lent her daughter a sum of money; and on that day two documents were executed. By the first, signed by the daughter, she acknowledged the receipt of the sum "as a loan to be used as a first payment upon the house . . . I also hereby agree to pay you interest . . . half-yearly, and further agree that the said loan is to be a lien upon my equity in the said house, until paid or otherwise satisfied, but repayment of said loan is not to be demanded of me so long as I pay interest, and provide for the aforesaid lien, or give equivalent security satisfactory to you." By the second document, signed by the testatrix, she declared that, notwithstanding any testamentary disposal of her estate, the sum lent to her daughter "is hereby given to her absolutely and unconditionally for her own use, benefit, and disposal, and . . . the said gift . . . is not to be considered a part of my estate or subject to any condition of my will." No interest on the loan was ever paid. The testatrix died in March, 1917. By her will, her daughter was appointed one of her executors. The two documents were found enclosed in an envelope with this endorsement: "In the event of my death, this envelope is to be delivered, unopened, to my daughter:"—Held, the intention to give being plain and absolute, being communicated to the donee, and continuing until the death of the testatrix, that "donatio in præsenti tradenda in futuro" was shewn, and that the daughter was not a debtor to her mother's estate in respect of the sum lent or interest thereon. [Re Goff (1914), 111 L.T.R. 34, followed. Strong v. Bird (1874), L.R. 18 Eq. 315; Re Innes, [1910] 1 Ch. 188, considered.]

Re Barnes, 42 O.L.R. 352.

Gift inter vivos—Minor—Acceptance—"Ascendants"—Illness of donor—Will—Validity—Acquiescence.

The words "other ascendants" used in arts. 303 and 789 C.C. (Que.), relating to the acceptance of a gift to a minor, ought to be

taken in their widest sense, so as to give effect to the gift. The word "ascendants" can be understood to mean ascendants in collateral line as well as in direct line. The duty of courts is to apply the law so as to give it the whole effect, and not to make distinctions where the law has not done it. A gift by parents to their minor son may be accepted by the minor's aunt, namely his father's sister. The words "unless circumstances tend to render them valid," in art. 762 C.C. (Que.), enable the Court to enquire into the circumstances surrounding a gift made during the illness of the donor. Such a gift may be upheld (a) if the illness of the donor, though serious, was not, at the moment of the gift, considered mortal either by the donor or by his children; (b) if in the deed itself there are clauses benefiting the donor which can be realized during the latter's life. The fact that a donor had made his will at the same time with the gift does not imply that he believed he was about to die. The heirs cannot attack the validity of a gift inter vivos and of a will in which they have acquiesced by receiving the benefits under those instruments, after giving quittance and discharge thereof to the donee by notarial deed, and their silence for 13 years, under pretence that they acted in error and ignorance of the nullity of the gift and of the will.

Pelletier v. Pilon, 24 Rev. Leg. 70.

III. Delivery.

(§ III—15)—Husband and wife—Furniture in house—Delivery—Intention.

A gift may be made by a husband to his wife—there is now no difficulty by reason of the supposed unity of husband and wife; and, unless creditors can assert the provisions of the Bills of Sale Act, such a gift is valid. But there cannot be a gift unless there is a deed or an actual delivery of possession. Delivery may be symbolic, but it must be such as to give to the donee complete dominion over the subject. Review of the authorities. [Cochrane v. Moore (1890), 25 Q.B.D. 57, followed. Kilpin v. Ratley, [1892] 1 Q.B. 582; Ramsay v. Margrett, [1894] 2 Q.B. 18, explained and distinguished.] The difficulty of making out a case of gift between husband and wife arises, not from the legal relation between them, but from the fact of their living together. The furniture in a house, in which house the defendant had a life-interest under the will of her husband, was claimed by her as having been given to her by her husband, when he brought her to live with him in his house. It was said that he used such words as, "The furniture is yours to do as you like with." The personal property of the husband was bequeathed to his son:—Held, that no intention to give was shewn by such words from a husband to his wife; and, for that reason, and also because no delivery was shewn, the wife's claim to the furniture, after her husband's death, could not be upheld.

Kingsmill v. Kingsmill, 41 O.L.R. 238.

GOODS.

See Sale; Bills of Sale; Chattel Mortgage.

GOODWILL.

See Trade name; Partnership; Fraud.

GOVERNMENTAL CONTROL.

See Constitutional Law; Crown.
Of carriers, see Carriers; Railway Board.
Of corporations, see Companies.
Of lands, see Public Lands; Mines and Minerals; Waters.

GUARANTY.

I. Validity; construction; effect.
II. Revocation; condition; discharge.

I. Validity; construction; effect.

As to suretyship, see Principal and Surety; Bonds.

(§ I—7)—Liability of trading company to bank—Bond executed by certain directors on condition that all directors should execute—Knowledge of bank—Failure of one director to execute—Provision in bond—Delivery of bond to bank in escrow—Contemporaneous oral agreement—Evidence.

Molsons Bank v. Cranston, 14 O.W.N. 345, affirmed in 15 O.W.N. 129.

Account of customer with bank—Liability of guarantor—Assignment for benefit of creditors under Assignments and Preferences Act—Bank holding securities—Valuation of, at amount of claim—Release of equity of redemption by assignee—Sale of equity—Terms of sale—Intention of parties—Conveyance accepted in satisfaction—Release of surety—Interference with surety's rights.

Union Bank v. Makepeace, 15 O.W.N. 179, reversing 13 O.W.N. 74, 40 O.L.R. 368, 38 D.L.R. 361.

II. Revocation; condition; discharge.

(§ II—10)—Purchaser's agreements—Agents—Effect of words in telegram.

In an action claiming that real estate agents engaged in the purchase of "purchasers' agreements" on behalf of the plaintiffs had guaranteed in writing payment of the balance of the purchase price under an agreement for sale, reliance was placed on a telegram in the following words: "Value on title made low to reduce registration costs are getting declaration as to moneys received from Love who is good man. Agreement good and guarantee it." The court (Davies and Idington, JJ., dissenting) held that the telegram taken with the other correspondence and circumstances did not guarantee payment of the agreement, but went no further than to guarantee that the agreement was a bonâ fide one and that the property and parties were good.

Schell v. McCallum & Vannatter, 42 D.L.R. 563, 57 Can. S.C.R. 15, [1918] 2 W.W.R. 735, affirming 38 D.L.R. 133, 10 S.L.R. 440.

(§ II—11)—Illegal rate of interest—Rate recoverable.

An illegal increase in the rate of interest charged the principal debtor does not render the guarantee void, but a condition will be read into the contract that the interest is not to exceed the rate allowed by statute.

Egbert v. Northern Crown Bank, 42 D.L.R. 326, [1918] A.C. 903, 119 L.T. 659, [1918] 3 W.W.R. 132, affirming 33 D.L.R. 367, 11 A.L.R. 1, sub nom Northern Crown Bank v. Woodcrafts.

(§ II—12)—Continuing—Discharge of guarantor—Notice.

A clause in a guarantee that "this shall be a continuing guarantee, and shall cover all the liabilities which the customer may incur or come under until the undersigned, or the executors or administrators of the undersigned, shall have given the bank notice in writing to make no further advances on the security of this guarantee" stipulates that the guarantee is to remain in force until there is a notice given by each and all of the guarantors, the executors of any deceased co-signatory coming in his place.

Egbert v. Northern Crown Bank, 42 D.L.R. 326, [1918] A.C. 903, 119 L.T. 659, [1918] 3 W.W.R. 132, affirming 33 D.L.R. 367, 11 A.L.R. 1, sub nom Northern Crown Bank v. Woodcrafts.

GUARDIAN AND WARD.

See Infants; Insane Persons.

(§ I—1)—Appointment and removal—Domicile.

Where the natural and legal guardian and the person seeking to be made the judicial guardian of an infant are both domiciled and resident within the province where the application is made, the Court has jurisdiction to set aside the natural and legal guardian and appoint another guardian, although the infant is at the time residing outside the province. [Re Willoughby, 30 Ch. D. 324, referred to.]

Re McGibbon, 39 D.L.R. 177, 13 A.L.R. 196, [1918] 1 W.W.R. 579.

(§ I—2)—Minor not domiciled or resident.

Although a minor, neither domiciled nor resident in Quebec, has a tutor appointed by the court of domicile, the Court may appoint a tutor resident in the province to represent and protect the minor in a matter to be judicially determined in the Quebec courts.

A. F. Byers Co. v. Bartolucci, 42 D.L.R. 486, 27 Que. K.B. 359.

HABEAS CORPUS.

I. In Provincial Courts.
- A. In general.
- B. Power to issue; who may demand.
- C. Scope of writ; questions considered; right to discharge.
- D. Procedure; judgment.

Review of proceedings, see Appeal; Certiorari; Criminal Law.

Annotations.

Habeas corpus, procedure: 13 D.L.R. 722.

Prosecution for same offence after conviction or commitment quashed: 37 D.L.R. 126.

Bail pending decision on writ of habeas corpus: 44 D.L.R. 144.

I. In Provincial Courts.

B. Power to issue; who may demand.

(§ I B—5)—Alien enemy.

An alien enemy who was resident in a foreign country at the outbreak of the great war is not within the protection of the Royal Proclamations 1914, and on being arrested by a Canadian Immigration officer his detention cannot be inquired into on a writ of habeas corpus; an alien enemy who is not within the King's protection has no status to sue out a writ of habeas corpus.

Re Gottesman, 29 Can. Cr. Cas. 439, 41 O.L.R. 547.

Application for—Fugitive Offenders Act—Warrant of commitment by magistrate—Strong presumption of guilt—Evidence as to offence.

Re Harrison (B.C.), 41 D.L.R. 731, 30 Can. Cr. Cas. 150.

Jurisdiction to issue writ.

The Court of King's Bench alone, not the Superior Court, has the power to grant a habeas corpus to an accused condemned in a criminal prosecution.

Miller v. Malepart, 20 Que. P.R. 184.

Custody of child—Father.

A writ of habeas corpus can only be had in the case of persons imprisoned or deprived of their liberty. So it cannot be issued when children old enough to choose whom they wish to live with, indicate a desire to remain with their grandmother, with whom they are free and by whom they were brought up. In such circumstances, without denying to the father the right to obtain possession of his children in favourable cases, a writ of habeas corpus should be refused him, if, at the time of the application, he is at the war and does not shew any reasonable motive to take the guardianship of his children away from their grandmother.

Osmun v. Morin (McAndrew), 27 Que. K.B. 282, 24 Rev. de Jur. 251.

C. Scope of writ; questions considered; right to discharge.

(§ I C—10)—Review of commitment.

Habeas corpus proceedings will lie to review a justice's commitment of the accused for trial made on a preliminary enquiry. [R. v. Delisle, 5 Can. Cr. Cas. 210, referred

to; see R. v. Weiss (No. 1), 21 Can. Cr. Cas. 438, 13 D.L.R. 166.]

Rex v. Mackey (N.S.), 29 Can. Cr. Cas. 167. [See 29 Can. Cr. Cas. 282, 419, 40 D.L.R. 287.]

EXTRADITION CASE.

The question before the Court on a habeas corpus case under the Extradition Act, Can., is whether the accused was in lawful custody at the time of the issue of the writ. The lawfulness of the custody must depend upon the question whether there was a sufficient compliance with the provisions of the Extradition Act and if there was evidence upon which the extradition Judge could act in making a committal order; his discretion is not reviewable on habeas corpus. (Per Perdue, J.A.) [U.S.A. v. Gaynor, [1905] A.C. 128; Re Arton (No. 2), [1896] 1 Q.B. 509; Re Galway, [1896] 1 Q.B. 230, referred to.]

Re Rosenberg 29 Can. Cr. Cas. 309, 28 Man. L.R. 439, [1918] 1 W.W.R. 845.

REDUCING IMPRISONMENT.

On the hearing of a habeas corpus to which a regular commitment and a regular summary conviction is returned, the Court has no discretion to reduce the award of imprisonment lawfully made by the lower Court.

O'Neil v. Carbonneau, 29 Can. Cr. Cas. 340, 54 Que. S.C. 417.

BAIL—POWER OF COURT TO GRANT.

In those cases where statutory power has been given to inferior tribunals to try indictable offences and where the same or like methods of reviewing their judgments are also provided as in the case of trials upon indictment in the ordinary course and the remedies by way of certiorari or habeas corpus are excluded, the right to bail, on a motion for certiorari or habeas corpus ceases to exist, unless given by statute, but only because the remedy by certiorari or habeas corpus is gone. Except in such cases a Court, having the inherent power of the former Court of King's Bench, has jurisdiction to admit to bail pending the disposition of an application for certiorari or habeas corpus, except in the case of a party in custody on an execution in a criminal matter tried on indictment, according to the due course of the common law. The provisions in the Criminal Code dealing with the granting of bail or its equivalent on a pending appeal, do not, since the Code is not exclusive of the common law, exclude any inherent power of the Court with respect to granting bail.

Rex v. Iwanachuk (Alta.), [1918] 3 W.W.R. 207, 13 A.L.R. 543, 30 Can. Cr. Cas. 139.

GROUNDS—CERTIFIED COPY OF SENTENCE.

An applicant for a habeas corpus cannot urge grounds refused on previous applications. A copy of the sentence certified by the assistant clerk of the Court constitutes a valid warrant for imprisonment.

Myers v. Malepart, 20 Que. P.R. 217.

IRREGULAR SENTENCE—AMOUNT OF COSTS—AMENDMENT.

A sentence of imprisonment stating that an offender, who has been found guilty of assault, "is condemned to pay a fine of $20 and the costs incurred on the proceedings, and in default of paying the said sum and the costs of transfer to the common jail of the district, to be imprisoned in the said jail for the period of two months," without mentioning the amount of those costs, is irregular; and the prisoner is entitled to be discharged by offering only the amount of the fine. But the prisoner cannot be freed on a writ of habeas corpus, unless he renews his offer to pay the fine, and deposits the amount in Court with his petition. When a sentence of imprisonment is irregular, the tribunal, where the demand of habeas corpus is made, may order that the prisoner be held for a certain fixed period in order to allow the magistrate to substitute a properly drawn sentence.

Morin v. Gaoler of Kamouraska, 53 Que. S.C. 124, 30 Can. Cr. Cas. 59.

(§ I C—11A)—POWER TO ORDER FURTHER DETENTION.

Apart from the provisions of Cr. Code Sec. 1120 as to ordering further detention on a habeas corpus motion, notwithstanding the irregularity of the commitment, the Court has power to remand the accused to his former custody where there has been an abortive trial before a magistrate; but such power of remand is to be exercised only when it is necessary in the interests of justice. [R. v. Frejd, 18 Can. Cr. Cas. 110, 22 O.L.R. 566, considered; see R. v. Kolember, 22 Can. Cr. Cas. 341, 16 D.L.R. 146.]

Ex parte Carroll (N.B.), 41 D.L.R. 196, 29 Can. Cr. Cas. 213.

DISCHARGE—CONDITIONS—LEAVE TO FILE AMENDED COMMITMENT.

Where the warrant of commitment following a summary conviction awarding imprisonment for non-payment of a fine and costs states the amount of the fine, and is conditional further upon payment of the complainant's costs, the amount of which are not stated, and of the costs of conveying to gaol, the amount of which have not been certified by the constable to the gaoler, the prisoner would not be entitled to discharge on habeas corpus without tendering the fine as to which the commitment was valid and bringing the amount of same into Court on the habeas corpus motion by way of renewal of the tender made to the gaoler. The Court may, however, on motion of the complainant shewing cause, refuse immediate discharge and direct under Code sec. 1120 that leave be given to file within a limited time an amended commitment correcting the defect and also the constable's certificate of the costs of conveying to gaol. [R. v. Morgan, 5 Can. Cr. Cas. 63, R. v. Barr, 11 Can. Cr. Cas. 1, applied; R. v. Wright, 10 Can. Cr. Cas. 461, referred to.]

Cotè v. Morin; Morin v. Gaoler of Kamouraska, 30 Can. Cr. Cas. 59, 53 Que. S.C. 124.

(§ I C—12)—Summary trial—Illegal arrest—Jurisdiction.

It is a ground for discharge on habeas corpus that the accused was illegally arrested without a warrant, and not on view, for an indictable offence, and was summarily tried by the magistrate, notwithstanding a protest made that he had no jurisdiction because of the illegal arrest. [R. v. Miller, 25 Can. Cr. Cas. 151, followed.]

Rex v. Willson (Alta.), 29 Can. Cr. Cas. 42.

(§ I C—12A)—Warrant of commitment—Amendment.

The fact that a warrant of commitment is defective is not a ground for an application by way of habeas corpus for the release of the prisoner, if the conviction was validly made under a proper indictment; the warrant may be amended or replaced by another in due form.

The King v. Flaherty and Malepart, 43 D.L.R. 253, 27 Que. K.B. 555.

(§ I C—13)—Sentence by Court of King's Bench.

The Superior Court will not revise on habeas corpus a sentence pronounced by the Court of King's Bench. In order that the Superior Court may revise a sentence, the sentence must be filed in that Court.

Flaherty v. Malepart, 20 Que. P.R. 68.

D. Procedure; judgment.

(§ I D—21)—Record—Contradiction.

Where a summary conviction is made by a Court of Record, e.g., by a Court of Sessions of the Peace in the Province of Quebec, for an offence punishable only on summary conviction, the same rule applies to exclude extrinsic evidence in contradiction of the record on a habeas corpus application in respect of the conviction as would apply in respect of other convictions made by a Court of Record; and if the record produced contains the recital of facts requisite to confer jurisdiction it is conclusive and cannot be contradicted by extrinsic evidence. [Re Sproule, 12 Can. S.C.R. 140, applied.]

O'Neil v. Carbonneau, 29 Can. Cr. Cas. 340, 54 Que. S.C. 417.

(§ I D—24)—Discharge of prisoner—Jurisdiction to set aside.

The Supreme Court of Nova Scotia has no jurisdiction to set aside an order for discharge in the nature of habeas corpus. [Re Blair, 23 N.S.R. 225, followed.]

Re Mackey (N.S.), 40 D.L.R. 287, 29 Can. Cr. Cas. 282.

HANDWRITING.

Annotations.

Comparison of; When and how comparison to be made: 13 D.L.R. 565.

Questioned documents and proof of handwriting: 44 D.L.R. 170.

HARBOURS.

See also Waters; Collision; Expropriation.

Annotation.

"Public harbours," B.N.A. Act: 26 D.L.R. 69.

(§ I—5)—B.N.A. Act—Provincial grant—Expropriation—Wharf—Compensation.

Bedford Basin, being a public harbour at the time of Confederation and the property of the Province of Nova Scotia, passed to the Dominion by virtue of the provisions of the British North America Act. A subsequent provincial grant of a water-lot thereon is therefore void and confers no title. [Fisheries case, [1898] A.C. 700; Attorney-General v. Ritchie (English Bay case), 52 Can. S.C.R. 78, 26 D.L.R. 51, followed; The King v. Bradburn, 14 Can. Ex. 419, referred to.]

Maxwell v. The King, 40 D.L.R. 715, 17 Can. Ex. 97.

HEALTH.

Regulation of industries—Offences—Jurisdiction—Recorder's Court—Procedure—Notice—Security for costs—Penalties—Board of health.

An action for having kept an establishment for the melting of suet, constructed contrary to the rules of the trade and without the equipment required by the Act respecting industrial establishments of Quebec, can be taken only before a Judge of sessions or a police magistrate in the City of Montreal or Quebec. The Recorder's Court of the City of Montreal, although having the powers of two justices of the peace, is not competent to decide such an action. Before the accused can be considered in default he must have received 30 days' previous written notice, stating the offence complained of, to enable him to obtain the apparatus and instruments required by the Act. If the complaint is made by a person other than the inspector, such person must previously deposit with the one issuing the summons the sum of $20 to secure the costs. The statute imposing fines for offences under it and requiring that they shall be payable to the treasurer of the province, is of public order, and the provincial board of health of Quebec, although it has the right to pass by-laws concerning industrial establishments, cannot change that provision of the law and order that the fine be payable to the board.

Chaput v. Duquette, 54 Que. S.C. 399.

HEARSAY.

See Evidence.

HEIR.

See Descent and Distribution; Wills; Executors and Administrators.

HIGHWAYS.

I. Establishment; width.
   A. Establishment.
   B. Width.

II. TITLE; USE; OBSTRUCTION.
A. In general; title and property rights.
B. Uses; what allowed in street generally.
C. Obstruction generally.
D. Use and obstruction by railroads..
E. Rights as to trees or materials in street.
III. IMPROVEMENTS; DIVERSION; CHANGING GRADE.
IV. DEFECTS; LIABILITY FOR INJURIES TO TRAVELLERS.
A. Liability of municipality.
B. Liability of others.
C. Contributory negligence.
D. Notice.
V. DISCONTINUANCE; ALTERATION; ABANDONMENT.
A. Discontinuance.
B. Alteration.
C. Abandonment.
VI. HIGHWAY OFFICERS.

Municipal by-laws as to, see Municipal Corporations.

Use and obstruction by railways, see Street Railways; Railways.

Use of automobiles on, see Automobiles.

As to bridges, see Bridges.

Negligence generally, see Negligence.

As to expropriation, see Expropriation; Damages, III L.

Annotations.

Establishment by statutory or municipal authority; irregularities in proceedings for the opening and closing of highways: 9 D.L.R. 490.

Defects; notice of injury; sufficiency: 13 D.L.R. 886.

Duties of drivers of vehicles crossing street railway tracks: 1 D.L.R. 783.

Unreasonable user as negligence, nuisance: 31 D.L.R. 370.

Liability of municipal corporations for non-repair of highways and bridges: 34 D.L.R. 589.

I. Establishment; width.

A. ESTABLISHMENT.

(§ I A—2)—PRIVATE ROAD—PUBLIC USER—ABANDONMENT—INTENTION OF OWNER—PRESCRIPTION.

A road laid out by an individual for the sole use of his estate does not become a public road by the sole fact of long public use. It is necessary, besides, that the owner has made a formal or presumed abandonment of it to the public. Abandonment may be inferred from acts of the owner and from particular circumstances in the particular case, but proof of his intention to give up his ownership should be unequivocal. Following the conclusions adopted by the majority of Judges of the Supreme Court in the case of Dominion Textile Co. v. Harvey, the ten year prescription for roads enacted by the Act 18 Vict. ch. 41, only applies to roads open and used by the public ten years before the adoption of the Act. In order to lay a basis for the prescription of a road possession by the public should unite all the conditions of the common law. A road of sufferance may always be closed by the owner.

Page v. Gauvreau, 27 Que. K.B. 490.

TOWNSHIP BY-LAW AUTHORISING THE TAKING OF LAND FOR ROAD—VALIDITY—PRESUMPTION—TITLE TO LAND IN CROWN—SUBSEQUENT CROWN GRANT NOT RECOGNIZING LAND INDICATED BY BY-LAW AS ROAD-ALLOWANCE — BY-LAW INEFFECTIVE ALSO BECAUSE REQUIREMENTS OF MUNICIPAL ACT NOT COMPLIED WITH—DEDICATION — USER — ACQUIESCENCE — EVIDENCE — TITLE OF PLAINTIFF — ACTION FOR TRESPASS — DAMAGES — INJUNCTION.

Sawyer v. Township of Sherborne, 14 O.W.N. 22.

B. WIDTH.

(§ I B—15)—ENCROACHMENT—ACTION FOR MANDAMUS TO TOWNSHIP CORPORATION TO RESTORE ROAD TO ORIGINAL WIDTH—FENCES—NON-FEASANCE—REMEDY.

Tompkins v. Township of Harwich, 14 O.W.N. 325.

II. Title; use; obstruction.

A. IN GENERAL; TITLE AND PROPERTY RIGHTS.

(§ II A—20)—MUNICIPAL ROAD—PRESCRIPTIVE RIGHTS.

A piece of land becomes a municipal road as soon as the corporation has taken possession of it for such purpose, even if the works for making the road have been done only on part of its width. When all the formalities required for the taking over of land for road purposes have been fulfilled by a municipal corporation, that land is no longer private; it becomes imprescriptible and cannot become the object of useful possession to base a possessory action.

Faucher v. Hébert, 54 Que. S.C. 316.

C. OBSTRUCTION GENERALLY.

(§ II C—60)—UNOPENED ROAD ALLOWANCE—OBSTRUCTION BY FENCES—SUBSTANTIAL INJURY TO PLAINTIFF—DEPRIVATION OF ACCESS TO LAND—RIGHT TO MAINTAIN ACTION—SURVEYS ACT, R.S.O. 1914, CH. 166, SEC. 19—MANDATORY INJUNCTION—TRIVIAL DISPUTE—COSTS.

Membery v. Smith, 15 O.W.N. 119.

III. Improvements; diversion; changing grade.

(§ III—100)—HIGHWAY IMPROVEMENT ACT—POWERS OF COUNTY.

A county for the purposes of the Highway Improvement Act (R.S.O. 1914, ch. 40, secs. 4 (1), 5 (1), 12 (2) and 22, in order to make a continuous good road, may assume a part of a road within a village corporation.

Village of Merritton v. County of Lincoln, 39 D.L.R. 328, 41 O.L.R. 6, 13 O.W.N. 162, reversing 12 O.W.N. 370.

LOCAL AND COUNTY ROAD—VALIDITY OF PROCEEDINGS.

A road, whose side is entirely situated

within one municipality, is a local road, even if one of its sides runs along a neighbouring municipality (Mr. Justice Cross, dissenting). (2) The act of a county council which, by its minutes of proceedings, charged a local municipality with the costs of opening and maintaining a road which benefited only one taxpayer, constitutes an injustice and oppression sufficient to found an action to annul the minutes.

La Corp. du Comté de Nicolet v. La Corp. du Village de Villers, 27 Que. K.B. 289.

(§ III—104)—Town Act—Changing grade —Drainage—Negligence.

No action will lie for doing that which the legislature has authorized, if it be done without negligence. The fact that by altering the grade of a street under authority of the Town Act (1915, Sask. Stats., ch. 19) the natural drainage was diverted would not constitute negligence, but where the raising of the grade has the effect of, not only diverting the drainage, but of damming it up, the town is liable for negligence in not providing proper means for carrying off the accumulation. [Geddis v. Bann Reservoir (1878), 3 App. Cas. 430, followed.]

Eakins v. Town of Shaunavon, 42 D.L.R. 473, [1918] 2 W.W.R. 1077, affirming 11 S.L.R. 310, [1918] 1 W.W.R. 566.

Change of level—Increased value—Compensation.

The owner of a house fronting upon a public street the level of which is changed by the City of Montreal, can recover from the city the depreciation in value sustained by his real property; but the damages may be compensated for by the increased value given to the property by the change of level.

Boisjoly v. City of Montreal, 53 Que. S.C. 122.

IV. Defects; liability for injuries to travellers.

A. Liability of municipality.

(§ IV A—120)—Non-repair—Injury to person in motor-vehicle — Negligence — Speed — Carelessness — Knowledge — Driver under age—Motor Vehicles Act.

In an action by a husband and wife to recover damages from a township corporation for injuries caused to the wife, by reason of a motor-vehicle in which she was being driven along a road in the township dropping into a hole at the edge of a bridge forming part of the roadway, it appeared that the vehicle was owned by the husband, and was, at the time of the occurrence, being driven by the plaintiffs' son, a boy under 16 years of age, and that the speed of the vehicle, as it descended a hill and passed off the bridge, was between 15 and 20 miles an hour. The son had driven the vehicle over the same place two days before, and he and the plaintiffs then felt a bump as they passed from the road to the bridge. Held, that the son's duty, having regard to the knowledge which he had of the condition of the road at the bridge, was to have driven with caution off the bridge; his carelessness was the cause of the injury to his mother; and, although the road was not in good repair for motor-vehicle traffic, at the speed the plaintiffs were travelling, there was no negligence on the part of the defendants, and the plaintiffs were not entitled to recover damages. Held, also, that the plaintiffs were identified with their driver; his negligence was theirs; the father knew that his son, owing to his youth, was prohibited by the Motor Vehicles Act, R.S.O. 1914, ch. 207, sec. 13, as amended by 7 Geo. V. ch. 49, sec. 10, from driving a motor-vehicle; and yet it was by the father's authority, and with the concurrence and sanction of his co-plaintiff, that the boy was driving. The use of the highway which the son was making, at the instance of the plaintiffs, was unlawful—they were unlawfully upon the defendants' highway. Review of the authorities. A rural municipality is not bound to maintain its roads in such repair that they shall be safe for motor-vehicles driven at the speed at which the plaintiffs were proceeding. [Dictum of Meredith, C.J.O., in Davis v. Township of Usborne (1916), 28 D.L.R. 397, 36 O.L.R. 148, 151, explained.]

Roe v. Tp. of Wellesley, 43 O.L.R. 214.

Non-repair—Opening in roadway—Absence of guard—Injury to bicyclist — Defective eyesight — Negligence of municipal corporation—Negligence of bicyclist—Findings of trial Judge—Appeal.

Westcott v. City of Woodstock, 14 O.W.N. 291, affirming 13 O.W.N. 480.

Non-repair—Death of person walking on highway—Dangerous condition continued for long period—Negligence—Cause of death—Inference from facts found by trial Judge.

Bowles v. City of Toronto, 15 O.W.N. 216.

Non-repair—Traveller in motor-vehicle killed—Vehicle skidding and sliding into ditch at side of travelled road —Negligence of municipal corporations—Absence of fence or guard—Ditch constructed for drainage purposes under legislative sanction—Responsibility of municipality — Negligence of driver of vehicle—Husband of person killed and plaintiff in action for damages for death —Evidence.

Anderson v. Townships of Rochester and Mersea, 15 O.W.N. 269.

Parties — Municipality — Province — Petition of right.

A defendant corporation, sued in damages for an accident which happened in a road formerly under its control, but which, at the time of the accident, was under the control and direction of the government of the province, cannot call the Crown in warranty;

the proper way to plead a claim against the government is by petition of right.

Turcotte v. Pariosse de St. Joseph, 20 Que. P.R. 250.

(§ IV A—127)—Sewer—Legislative sanction — Negligence — Consequential injuries.

Where the legislature has authorized or sanctioned the construction of a sewer under a roadway, and the sewer has been constructed without negligence, and every precaution has been observed to prevent injury arising therefrom, the sanction of the legislature carries with it this consequence, that if damage results which is the natural consequence of constructing such sewer independently of negligence, the city is not liable. [Vancouver v. Cummings, 2 D.L.R. 253; Jamieson v. City of Edmonton, 36 D.L.R. 465, followed.]

Douglas v. City of Regina, 42 D.L.R. 464, 11 S.L.R. 255, [1918] 2 W.W.R. 1000.

(§ IV A—145)—Removal of snow and ice —Nuisance—Damages.

Where statutory power has been conferred on a street railway company for the removal of snow from its tracks "so as to afford a safe and unobstructed passageway for carriages and vehicles" the company is liable in damages, if in the exercise of such power it renders the highway unsafe for traffic, thereby causing injury to a pedestrian.

Elliott v. Winnipeg Electric R. Co., 42 D.L.R. 106, 56 Can. S.C.R. 560, [1918] 2 W.W.R. 820, reversing 38 D.L.R. 201, 28 Man. L.R. 363.

Nuisance—Snow and ice—Removal.

The efficient removal of snow and ice from a highway, in accordance with statutory powers given, by a municipality, does not create a nuisance for which damages can be recovered. [Elliott v. Winnipeg Electric R. Co., 38 D.L.R. 201 (reversed in 42 D.L.R. 106, 56 Can. S.C.R. 560), followed.]

Clark v. Winnipeg and Winnipeg Electric R. Co., 40 D.L.R. 533, 28 Man. L.R. 609, [1918] 2 W.W.R. 457.

Telephone wires — Obstruction — Nuisance—Damages.

Rural telephone wires so placed that a person driving on to the highway with a load of hay has to stoop when passing under them, constitute an obstruction in the highway and amount to a nuisance; where the position of the wires is the proximate cause of an accident the owner or trustee of the system is liable for damages under the Fatal Accidents Act; the fact that the line was erected and continued under statutory authority is no bar to the action.

Magill v. Township of Moore, 41 D.L.R. 78, 41 O.L.R. 375, reversed in 44 D.L.R. 489.

Nuisance—Telephone poles—Removal.

A private corporation should be careful in interfering with the property of others upon a highway to which it has obtained a limited right of user; where it seeks to justify the removal of such property on the ground that it was a nuisance, it must shew that it could not have constructed its works without so interfering therewith [Bagshaw v. Buxton Local Board, 1 Ch.D. 220; Reynolds v. Presteign Urban District Council, 65 L.J.Q.B. 400, applied]. A telephone company which acquires from another company the latter's poles and wires, which have been on a highway for years without objection from the municipal council, is entitled to assume that such equipment is on the highway with the council's approval. [Toronto v. Toronto Electric Light Co., 10 O.L.R. 621, referred to].

Okanagan Telephone Co. v. Summerland Telephone Co., [1918] 1 W.W.R. 656, 25 B.C.R. 221.

Telephone poles — License — Right of second company.

Where a licensee of a highway, e.g., a telephone company, has placed its equipment thereon, a second licensee of the same highway is not entitled to interfere with it or do any act to the injury thereof. [Bell Telephone Co. v. Belleville Electric Light Co., 12 O.R. 571, followed].

Okanagan Telephone Co. v. Summerland Telephone Co., [1918] 1 W.W.R. 656, 25 B.C.R. 221.

(§ IV A—146)—Obstruction—Concurring causes—Negligence.

The rule in regard to negligence where a person is injured by coming in contact with an obstruction on a highway is that two things must concur to support the action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.

Freedman v. City of Winnipeg (Man.), 43 D.L.R. 126, [1918] 3 W.W.R. 479.

Obstructions—Death—Liability—Force majeure.

A municipality is responsible in damages for the death of a person caused by the bad state of a road under its care, that is (a) where the road had neither ditch nor culvert to carry off the surface water; (b) where the gully on the side of the road was not protected; (c) where sticks of timber were left alongside the road, projecting a few inches above its level; (d) where a considerable slope existed towards these sticks and gully without any guard rails to protect the travelling public. A municipality, sued in damages for the bad state of the road under its care, cannot plead cas fortuit or force majeure and climatic condition brought about by a great thaw which took place in the vicinity of the road and covered it with ice, when there has been ample time between the thaw and accident to remedy the condition of the road.

Denault v. United Tps. of Mansfield and Pontefract, 54 Que. S.C. 499.

(§ IV A—154)—Snow and ice—Repairs.

In determining whether a highway is in repair at the time an accident occurs, it is necessary to take into account the nature of the country, the character of the roads, the care usually exercised by municipalities in reference to such roads, the season of the year and the nature of the accident.

Clark v. Winnipeg and Winnipeg Electric R. Co., 40 D.L.R. 533, 28 Man. L.R. 609, [1918] 2 W.W.R. 457.

Non-repair—Pitch hole in snow.

Town of Oakville v. Cranston, 39 D.L.R. 762, 55 Can. S.C.R. 630, affirming 10 O.W.N. 315, 10 O.W.N. 175.

Non-repair—Injury to pedestrian by fall upon sidewalk—Liability of municipal corporation—Damages.

Lawrence v. Town of Orilllia, 13 O.W.N 453.

Non-repair—Injury to person falling on sidewalk covered with ice—Municipal Act, sec. 460—"Gross negligence"—Evidence.

McAfee v. Town of Deseronto, 15 O.W.N. 98.

V. Discontinuance; alteration; abandonment.

(See previous Annual Digests.)

VI. Highway officers.

(See previous Annual Digests.)

HOMESTEAD.

(§ IV A—30)—Execution against—Mortgage—Priority.

A homestead in Saskatchewan is free from the operation of any writ of execution, and the owner is entitled to dispose of it as he sees fit. A mortgage takes priority over an execution registered against the homestead although registered subsequently.

Pollock v. Holitski, 42 D.L.R. 491, 11 S.L.R. 352, [1918] 3 W.W.R. 41.

Exchange—Parent and child—Crown grant—Agreement—New bargain.

A father entered into an agreement to exchange his homestead for that of his son's. At the time of the agreement the son had not obtained a Crown grant for his homestead. After the son had received his Crown grant two letters passed between them with reference to the exchange that contained all the elements necessary to create a binding agreement. On the death of the son, his wife, who became administratrix of his estate, brought an action to enforce the agreement. Held, that the original agreement was void under sec. 142 of the Land Act, but that as the letters that passed between father and son after the son obtained a Crown grant to his homestead, contained all the elements necessary to creat an enforceable contract, they should be treated as a new bargain, and the exchange of the properties should be enforced.

Cotton v. Leighton, 24 B.C.R. 253.

General release by wife of her rights—Registration—Necessity of Judge's order—Homestead Act, as amended by sec. 2 (2), ch. 27, 1916 (Sask.).

Re Land Titles Act; Re Homesteads Act, [1918] 1 W.W.R. 504.

Right of alienation—Bonâ fide purchaser.

The father and mother of 12 children who, as such, have benefited by the free grant of a lot of land under 55-56 Vict. ch. 19, can only dispose of it in favour of one or more of their children by gift inter vivos or by will. Any other alienation is fundamentally void. A subsequent purchaser of a lot of this kind who does not know the origin of it, is a holder in good faith, and has the right of retention for his improvements and outlay.

Naud v. Lambert, 53 Que. S.C. 403.

HOMICIDE.

(§ I—6)—Negligence—Collision of ships—Findings—Depositions.

If a commitment for trial for manslaughter, based on alleged negligence, is found on a habeas corpus application to be entirely unsupported by evidence, the prisoner will be discharged on the ground of want of jurisdiction in the magistrate to commit.

Rex v. Mackey (N.S.), 29 Can. Cr. Cas. 167. [See 29 Can. Cr. Cas. 282, 419, 40 D.L.R. 287.]

(§ II—17)—Provocation—Directing jury—Manslaughter on murder charge.

Where there are no circumstances in evidence which could reduce the charge of murder to manslaughter, such as sudden provocation, the trial Judge need not direct the jury that they have the alternative power to find a verdict of manslaughter. [R. v. Jagat Singh, 28 D.L.R. 125, 25 Can. Cr. Cas. 282, considered; Eberts v. The King, 20 Can. Cr. Cas. 273, 7 D.L.R. 538, applied.]

Rex v. Sparkes, 41 D.L.R. 102, 51 N.S.R. 482, 29 Can. Cr. Cas. 116.

(§ III A — 20) — Excuse — Abuse and threats.

It is no justification of homicide that the deceased had on previous occasions abused and threatened the accused so as to make the latter apprehensive either of being killed or of receiving grievous bodily harm, if, at the time of the shooting, the accused was well armed and he was in no immediate danger from the other who was neither armed nor in a position threatening attack.

Rex v. Moke, 38 D.L.R. 441 (annotated), 12 A.L.R. 18, 28 Can. Cr. Cas. 296.

HORSES.

See Animals; Sale; Highways; Negligence; Railways; Street Railways; Automobiles.

HOTELS.

As to sale of liquors, see Intoxicating Liquors.

HOUSE OF ILL-FAME.

See Disorderly Houses.

HUSBAND AND WIFE.

I. Rights, liabilities and disabilities generally.
- A. Of husband.
- B. Of wife.
- C. Joint liabilities.

II. Property rights; transactions between.
- A. In general.
- B. Estate by entiretes.
- C. Community property.
- D. Wife's separate estate or business.
- E. Contracts with or conveyances to each other.
- F. Conveyances or mortgages to third persons.
- G. Trusts.
- H. Partnership.
- I. Antenuptial contract.
- J. Fraud on marital rights.
- K. Rights of husband's creditors.

III. Actions.
- A. By husband.
- B. By wife.
- C. By both husband and wife.
- D. Between husband and wife.

IV. Abandonment of wife.

As to validity of marriage, separation, see Marriage; Divorce and Separation.

Custody of children, see Divorce and Separation; Infants, I C.

As to domicile, see Domicile; Conflict of Laws.

Transactions between, see Fraudulent Conveyances.

Annotations.

Wife's competency as witness against husband; criminal non-support: 17 D.L.R. 721.

Married women; separate estate; property rights as to wife's money in her husband's control: 13 D.L.R. 824.

Enemy alienage as affecting status of married women: 23 D.L.R. 375, 380.

Validity of foreign divorce; domicile: 33 D.L.R. 146, 156.

I. Rights, liabilities and disabilities generally.

(§ I A—16)—Presumption of agency—Necessaries.

The presumption of law is that a wife in purchasing necessaries acts as agent for her husband and the onus is on him to rebut that presumption. [Vopni v. Bell, 8 W.L.R. 205, followed.]

Gaetz v. Jarvis (Alta.), [1918] 3 W.W.R. 888.

Neglect to provide wife's necessaries—Criminal offence — Information — Sufficiency.

A husband who omits without lawful excuse to provide necessaries for his wife is not guilty of an offence under sec. 242 (2) of the Criminal Code if her life is not endangered or health is not, or is not likely to be, permanently injured by his neglect, nor is he guilty under sec. 242 (a) if his wife be not in destitute or necessitous circumstances. Therefore, an information which omits reference to such ingredients is not sufficient under sec. 242 (2) or (a).

Rex v. McAuley (Man.), [1918] 3 W.W.R. 178.

B. Of wife.

(§ I B—25)—Liability for servant's wages.

A wife who engages a domestic servant is liable for the latter's wages, although by the contract of marriage between said wife and her husband, it is stipulated that said husband undertakes to pay the expenses of marriage.

Johnson v. Hudon & Vir, 24 Rev. de Jur. 570.

(§ I B—26)—Promissory note for benefit of husband—Independent advice—Duress—Threat—Agent.

In an action against a man and his wife to recover a sum of $500 and for other relief, it appeared that the wife had signed a promissory note and an agreement whereby she had undertaken to pay to the plaintiff, who was the employer of her husband, certain sums of money due by the husband to the plaintiff. The wife was not in any way connected with the business between her husband and the plaintiff. Held, upon the evidence, that the wife had no legal and independent advice when she signed the documents, and received no consideration therefor; that she was induced to sign by a threat that the plaintiff would cause her husband to be arrested if she did not do so. The threat was made by the manager of a bank, who took the note to the defendant. The manager said to the wife that the plaintiff had told him (the manager) that he (the plaintiff) would have the husband arrested if he did not settle; the manager afterwards told the plaintiff what he had said; and the plaintiff never repudiated or disavowed the transaction. Held, that the manager was the agent of the plaintiff in the transaction; and the wife was relieved from liability. [Bank of Montreal v. Stuart, [1911] A.C. 120, followed.]

McCallum v. Cohoe, 42 O.L.R. 595, reversed in 15 O.W.N. 262.

Erection of building on wife's land—Contract made with husband — Agency of husband for wife—Evidence — Election — Ratification — Estoppel.

East v. Harty, 14 O.W.N. 126, affirming 12 O.W.N. 413.

Liability of wife on promissory note and agreement signed for benefit of husband — Consideration — Undue influence — Independent advice — Evidence — Onus—Duress — Threat —Agency of stranger for person in whose favour note and agreement

EXECUTED—FINDINGS OF TRIAL JUDGE—APPEAL.

McCallum v. Cohoe, 15 O.W.N. 262, reversing 42 O.L.R. 595.

II. Property rights; transactions between.

A. IN GENERAL.

(§ II A—50)—PRESUMPTIVE TRUSTS—CONSIDERATION.

A husband is entitled to the help and assistance of his wife, and the profits of a business carried on by them jointly, accrue to the husband solely. Where a husband deeds property to his wife without consideration, no presumption of trust arises, but the presumption is that a gift is intended. Down to the passing of 6 Geo. V., ch. 29, the common law rights of a husband in his wife's real estate were unaffected as regards property received by her from him.

Garnett v. Garnett, 45 N.B.R. 466.

GRAIN AND OTHER CHATTELS SEIZED ON WIFE'S FARM UNDER EXECUTION AGAINST HUSBAND — CLAIM BY WIFE — INTERPLEADER ISSUE—FINDING IN FAVOUR OF WIFE AS TO GRAIN GROWN ON FARM—FINDING IN FAVOUR OF EXECUTION CREDITOR AS TO OTHER CHATTELS—COSTS.

Robinson v. Robinson, 14 O.W.N. 199, reversed in 15 O.W.N. 285.

SEPARATION OF PROPERTY—GIFT—USUFRUCT — HEIR — CREDITOR — REGISTRATION —HYPOTHEC.

One who, in a marriage contract, makes his wife a gift of $1,000, reserving to himself the usufruct during his life, is entitled, at his wife's death, to claim from her heir a separation of the property, and to register a notice against a property belonging to her estate, in order to secure his privilege against creditors of the heir. The fact that the donor might have sued his wife's heir to recover one year's interest on the said $1,000 has not given rise to novation, or made him lose the benefit of the separation of the assets, or rendered void the hypothecary registration.

Roi v. Pelodeau, 53 Que. S.C. 97.

JUDICIAL ABANDONMENT OF GOODS—AUTHORIZATION.

When the refusal of a husband to authorize his wife to make a judicial abandonment of property is not without good grounds marital authority should be respected.

Paltiel v. Paltiel, 54 Que. S.C. 517.

REAL PROPERTY — PAYMENT — AUTHORIZATION OF HUSBAND.

When a contract is in writing, the demand for payment, in execution of the contract, must also be in writing. A demand of payment made by an advocate's letter is not sufficient. A married woman cannot renounce her rights to real property, and give real property in payment without the authority of her husband.

Dufresne v. Antonacci, 53 Que. S.C. 36.

C. COMMUNITY PROPERTY.

(§ II C—65)—RIGHT OF ACTION.

By Quebec law, a wife common as to property has no right of action against her husband to recover a debt due by him to her as long as the community exists.

Reid v. Pinault, 39 D.L.R. 152, 53 Que. S.C. 156, 24 Rev. de Jur. 59.

GIFT INTER VIVOS — ACCEPTANCE — PAROL EVIDENCE.

The gift of a sum of money during marriage to a wife common as to property falls into the community, and may be accepted by the wife alone, who, in such case, is deemed to act as agent of the husband to receive that which ought to belong to the community. If it were a question of the wife's own property, the authorization of the husband would be necessary. Illegal proof, such as that given by a husband who declares that he authorized his wife common as to property to accept for him a gift of $5,000, becomes legal if it is produced without objection, following the decision of the Supreme Court.

Robin dit Lapointe v. Pesant dit Sanscartier and Pesant, 27 Que. K.B. 88. [Reversed by Canada Supreme Court.]

D. WIFE'S SEPARATE ESTATE OR BUSINESS.

(§ II D—70)—NOTE—WANT OF AUTHORIZATION—NULLITY.

A married woman, separate as to goods, who gives a note for part of the price of property, does not do an act of administration; and if she is not authorized to sign this bill, it is void. It would be otherwise if the husband had authorized the purchase of the property for a sum which would cover the note.

Beaulieu v. Pearson, 54 Que. S.C. 361.

E. CONTRACTS WITH OR CONVEYANCES TO EACH OTHER.

(§ II E—80)—GIFT BY HUSBAND TO WIFE DURING COVERTURE — ANTENUPTIAL GIFT—EVIDENCE—INTENTION — WORDS OF GIFT—ACTUAL DELIVERY—MARRIED WOMEN'S PROPERTY ACT.

Elliott v. Elliott, 15 O.W.N. 218.

SEPARATION DEED—COVENANT BY WIFE—MORTGAGE.

A covenant in a separation deed whereby the wife covenanted to indemnify the husband against all debts and liabilities contracted by her held not to cover a covenant in a mortgage made by him, notwithstanding the facts that he had conveyed the mortgaged land to her and she had, subsequently to the execution of the separation deed, covenanted with the mortgagee to pay him principal and interest.

Walker v. Lees (B.C.), [1918] 3 W.W.R. 586.

EASEMENT—RIGHT OF WAY—BENEFITS.

The owner of real property cannot establish on his property a servitude of right of way in favour of an adjoining lot belonging to his wife, since art. 1265 C.C. (Que.) prevents a

husband and wife conferring benefits inter vivos upon each other.

Desautels v. Laramée, 53 Que. S.C. 519.

F. Conveyances or mortgages to third persons.

(§ II F—90)—Conveyance by wife—Possession of property—Execution.

Nichols v. McNeil, 39 D.L.R. 763, 55 Can. S.C.R. 632, affirming 50 N.S.R. 67.

H. Partnership.

(§ II H—105)—Business carried on by husband—Execution creditors.

Where a business has been begun and carried on by a husband in his own name on capital supplied by his wife, there being no agreement as to shares, the exertions of both helping to increase and make the business profitable, the husband has a proprietary interest in such business and he and his wife are partners in equal shares: the husband's interest is liable to satisfy his execution creditors.

Reid v. Morwick, 42 D.L.R. 244, 42 O.L.R. 224.

Deed—Parol evidence—Rights of creditors.

A notarial deed of partnership cannot be contradicted by parol evidence in an action by a creditor to shew that a married woman is only nominally a partner in the interest of her husband. A husband may represent his wife in her trade, without being considered as carrying the trade himself or in partnership with his wife; his creditors cannot, for such reason, seize the wife's assets under the pretence that she is only lending her name.

Kladis v. Pulos, 24 Rev. Leg. 482. [Motion to quash dismissed, 44 D.L.R. 523.]

Mercantile business.

When a husband and wife, separate as to goods, have together a mercantile establishment without special agreements, it forms between them a partnership in which each has an equal share, even though a third of the business should be considered as that of the wife. It is usually customary, in actions between husband and wife, for each party to pay their own costs, unless, for special reasons, the Court decides otherwise.

Guertin v. Brunet, 27 Que. K.B. 123, 24 Rev. de Jur. 2.

I. Antenuptial contract.

(§ II I—110)—Donation causa mortis—Future property — Third party — Nullity.

A donation in a marriage contract, by which the husband gives to his wife a third of the assets which he may possess in full ownership at the death of the first of the two consorts, to her and to her legal or testamentary estate, is a donation of future assets and "causa mortis." Such a donation is, as such, and seeing that it is made by one of the consorts to third parties, in contravention of art. 820 C.C. (Que.), void as to those parties. The words "legal or testamentary estate" contained in that donation can legally apply only to the children of said consorts and not to collateral heirs of the wife, who, as far as the donator is concerned, should be considered as third parties. Such donation becomes void by the wife predeceasing without leaving any children.

Marceau v. Tassé, 53 Que. S.C. 425.

III. Actions.

A. By husband.

(§ III A—141)—Alienation of wife's affections—War Relief Act.

The War Relief Act (Man.) 5 Geo. V., ch. 88, refers only to matters arising out of contract; its benefits cannot be claimed in actions for tort.

Stokes v. Leavens, 40 D.L.R. 23, 28 Man. L.R. 479, [1918] 2 W.W.R. 188.

(§ III A—143)—Hiring for service—Husband leaving employment—Wife refusing to leave—Receiving and harbouring—Loss of society and services—Damages.

Van Dorn v. Felger (Alta.), 42 D.L.R. 760, [1918] 3 W.W.R. 295.

B. By wife.

(§ III B—145)—Authorization to appear and plead—Appellate Judge.

Authorization to appear in judicial proceedings, which a Judge may grant to a wife upon the refusal of the husband, can be granted only by a Judge of the Court of original jurisdiction, and not by a Judge of an Appellate Court except in the case of authorization for a particular proceeding.

Aubry v. Allard and Legault, 27 Que. K.B. 86.

Action against sureties—Authorization.

A wife, separated as to property, and who has the entire administration of her property, may, without being authorized by her husband à ester in justice, exercise her recourse against the sureties for the purpose of recovering the amount of a judgment obtained against the principal debtor.

Duclos v. Dagenais, 54 Que. S.C. 71.

Service of writ — Domicile — Judicial authorization.

A husband absentee, who has never had his domicile at the place of ordinary residence of his wife, is not summoned in judicial proceedings for the purpose of authorizing his wife, by the service made on the wife of an action taken against her, and designating the husband as mis-en-cause. The judicial authorization to be party to a case, which can be granted to the wife only if the husband refuses to authorize her, cannot be granted by the Court until the husband has been validly summoned in the case. Proceedings taken by a wife under her husband's control, who has not been regularly authorized to be a party to the case, are absolutely null. Such nullity can be invoked at any time in the course of the proceedings, and as soon as

it is established the parties will not be entitled to proceed further.

Lafleche v. Laroche, 53 Que. S.C. 214.

OPPOSITION—COMMUNITY—PRESUMPTION.

If a married woman, styling herself as a widow, files in her capacity of owner an opposition to withdraw to a seizure of movables, and later amends her opposition to describe herself as a married woman authorized by her husband, there is a legal presumption that she is common as to property with her husband. In such a case the opposition should have been made by the husband as head of the community, and the opposition will be dismissed.

La Banque Nationale v. Bourdeau, 54 Que. S.C. 446.

IV. Abandonment of wife.

See Divorce and Separation.

HYPOTHEQUE.

See also Mortgage.

REMEDY FOR DETERIORATING PROPERTY SUBJECT TO HYPOTHEC—INTENTION TO DEFRAUD.

In order to be able to exercise the remedy given by arts. 2054 and 2055 C.C. (Que.), it is not sufficient for the creditor to allege and prove an act of deterioration committed by the debtor or by another holder, for the law does not make damages depend on a simple physical fact of deterioration, whether great or small, but the intention to defraud must be added to the act of deterioration.

Guindon v. James Maclaren Co., 24 Rev. de Jur. 483.

PRIORITIES—HYPOTHECARY CREDITOR CONSENTING TO REHYPOTHECATION—CONDITION—VALIDITY.

A creditor, who expressly or impliedly consents that real property hypothecated in his favour be hypothecated in favour of another, is deemed to have ceded the preference to the latter. But if the first creditor gives his consent, subject to the accomplishment of several conditions, the second creditor, in order to obtain priority and retain it, must see that each one of those conditions be fulfilled. A condition which cannot be accomplished in its entirety is not void and does not invalidate the obligation which depends on it; but such a condition is then reduced to so much of it as can be carried out.

Lenghan v. Nicole, 53 Que. S.C. 392.

OPPOSITION TO ANNUL—HYPOTHECARY CREDITOR — INTEREST — JUDGMENT — AMOUNT.

An hypothecary creditor has not, as such, a sufficient interest to make an opposition to annul the seizure of an immovable upon which he has his hypothec. Neither can he, without invoking the right of another, allege as reasons for his opposition: (a) that there is no valid executory judgment against the defendant; (b) that the allegations in the writ of execution are false; (c) that even if there was a judgment, it did not amount, in principal, interest and costs, to $40.

Michaud v. Destrempes, 54 Que. S.C. 152.

REGISTRATION—BONÂ FIDE HOLDER—TITLE—SIMULATION—RES JUDICATA.

One in possession of land under a title apparently regular and valid, can give a third party in good faith an hypothec upon the land; and such hypothec, duly registered, cannot be set aside even if the Courts have afterwards cancelled the title of the vouchee of the hypothec as being only a donation inter vivos disguised in the form of a deed of sale by private deed. The presumption of res judicata holds only against parties to the action; a debtor does not represent his hypothecary creditor.

Little v. Reaycraft, 24 Rev. Leg. 8.

EXECUTION — SALE — REGISTRATION — TIERS OPPOSANT—DEPOSIT IN COURT.

One who has acquired real property and has assumed the payment of an hypothec upon such property, has not the right, if the property is subsequently seized by the hypothecary creditor, to make a tierce opposition and to ask for the voidance of the seizure proceedings, if his deed of sale was only registered after the seizure, and he does not put in Court the amount of the hypothecary debt with interest and costs.

Dubuc v. Pigeon, 53 Que. S.C. 58.

ICE.

Liability for icy condition of highways, see Highways.

ILLEGAL CONTRACTS.

See Contracts, III.

IMITATION.

Passing off, see Trade-marks; Trade-name; Copyright; Patents.

IMPLIED AGREEMENT.

See Contracts.

Implied covenant in lease, see Landlord and Tenant.

Implied warranty in sale of goods, see Sale.

IMPLIED POWERS.

Of corporation, see Companies.

IMPRISONMENT.

See Criminal Law.

Liability for false imprisonment, see False Imprisonment; Malicious Prosecution; Arrest.

IMPROBATION.

See Cancellation of Instruments.

IMPROVEMENTS.

Lien for, see Liens; Mechanics' Liens.

Local improvements, see Taxes; Municipal Corporations.

INCOMPETENT PERSONS.

See Insane Persons.

INCORPORATION.

See Companies.

INDEMNITY.

See Bonds; Guaranty; Principal and Surety; Insurance; Master and Servant, V., 340.

(§ I—1)—Action for—Judgment.

In an action for indemnity, law and equity now being administered by the same Court, a plaintiff may have judgment for the full amount against which he is indemnified, although he has paid no part of it and may never pay any part of it, in cases where the defendant is not concerned in the application of the money. [Liverpool Mortgage Ins. Co.'s case, [1914] 2 Ch. 617; British Union and National Ins. Co. v. Rawson, [1916] 2 Ch. 476, referred to.] Per Riddell and Rose, JJ., a claim for an indemnity cannot be made the subject of a special endorsement, but where the whole merits of the case have been gone into, the trial should not be set aside and a new trial ordered, rule 183 being broad enough to enable the Court to make all necessary amendments and to give judgment according to the rights and merits of the case.

McDonald v. Peuchen, 41 D.L.R. 619, 42 O.L.R. 18.

INDEPENDENT ADVICE.

See Husband and Wife; Deeds.

INDEPENDENT CONTRACTORS.

Liability for acts of, see Highways; Municipal Corporations; Master and Servant.

INDIANS.

Indian reserve, see Intoxicating Liquors; Public Lands.

(§ I—1)—Offences outside reservation.

An Indian is punishable as other persons are for offences outside a reservation against provincial legislation.

Rex v. Martin, 39 D.L.R. 635, 41 O.L.R. 79, 29 Can. Cr. Cas. 189, affirming 40 O.L.R. 270.

(§ II—36)—Removal to new reserve—Expediency—Compensation.

The Exchequer Court, pursuant to the provisions of sec. 49a of the Indian Act, will recommend the removal of Indians from their Reserve to a new site, if, in the interest of the public and the welfare of the Indians, such removal seems expedient. Under sec. 2 (4) of the Act, they are to be compensated for the special loss or damage in respect of their buildings or improvements upon the Reserve.

Re Indian Reserve, City of Sydney, N.S., 42 D.L.R. 314, 17 Can. Ex. 517.

Committal under judgment debtor procedure — Contempt — Execution — Division Courts Act — Indian Act — Exemption — Powers of province — B.N.A. Act.

The provisions of secs. 190 et seq. of the Division Courts Act, R.S.O. 1914, ch. 63, relating to the imprisonment of debtors, are not intended to apply to Indians. An Indian who has no property other than what is, by virtue of sec. 102 of the Indian Act, R.S.C. 1906, ch. 81, exempt from seizure under execution, cannot be committed to gaol by a Division Court Judge, after examination as a judgment debtor, even though the Judge be of opinion that the Indian has sufficient means and ability to pay the debt: the Indian Act preventing the judgment creditor from taking the assets of the Indian in execution, they cannot be reached indirectly. There can be no contempt in withholding that which is by law exempt from seizure; and the person of an Indian—a ward of the Dominion Government and subject to the legislation of the Dominion Parliament by the British North America Act, sec. 91 (24)—cannot be taken in execution under a provincial statute.

Re Caledonia Milling Co. v. Johns, 42 O.L.R. 338.

INDICTMENT, INFORMATION AND COMPLAINT.

I. Form; requisites.
II. Sufficiency of allegations.
  A. In general.
  B. Intent; knowledge.
  C. Negation of defences or exceptions.
  D. Duplicity; repugnancy.
  E. Description of offence.
  F. Amendment.
  G. Sufficiency to support conviction.
III. Joinder of counts or persons.
IV. Quashing.

Annotation.

Criminal information; functions and limits of prosecution by this process: 8 D.L.R. 571.

I. Form; requisites.

See Criminal Law; Intoxicating Liquors; Summary Convictions; Certiorari; Habeas Corpus; Extradition.

(§ I—3)—Leave to prefer.

Leave to prefer an indictment may properly be refused the Crown when the accused has been discharged on a habeas corpus reviewing a magistrate's commitment for trial in respect of the same charge and holding the evidence insufficient on the merits to justify a committal for trial.

Rex v. Mackey (N.S.), 29 Can. Cr. Cas. 419. [See 29 Can. Cr. Cas. 167, 282, 40 D.L.R. 287.]

II. Sufficiency of allegations.

(See previous Annual Digests.)

III. Joinder of counts or persons.

(See previous Annual Digests.)

IV. Quashing.

(§ IV—70)—Concurrent indictments — Crown to elect.

Where a second grand jury was summoned and a second indictment brought in for the same offence because of the prosecution being in doubt as to the regularity of the first indictment, it is the privilege of the accused to compel the Crown to elect upon which of them it will proceed, but if the accused was tried only upon one of the indictments and made no motion to compel the Crown to elect, no prejudice is shewn which will invalidate the conviction made on such trial.

Rex v. Morin, 38 D.L.R. 342, 26 Que. K.B. 428, 28 Can. Cr. Cas. 269.

Irregularities—Authentication of depositions.

Irregularities in the signature of the depositions on which the commitment for trial was founded will not invalidate the bill found by the grand jury where no objection on account thereof has been raised until after electing a jury trial when arraigned under the speedy trials clauses, Part XVIII. of the Criminal Code (Code sec. 827).

Rex v. Morin, 38 D.L.R. 342, 26 Que. K.B. 428, 28 Can. Cr. Cas. 269.

INDORSEMENT.

See Bills and Notes.
See also Pleading; Writ and Process.

INFANTS.

I. In general; control; support; rights and liabilities.
A. In general.
B. Support of, and care for.
C. Custody.
D. Disabilities and liabilities.
II. Sale, lease or mortgage of real estate.
III. Actions.

Annotation.

Disabilities and liabilities; contributory negligence of children: 9 D.L.R. 522.

I. In general; control; support; rights and liabilities.

B. Support of, and care for.

See Parent and Child; Husband and Wife.

(§ I B—5)—Fund in hands of trustees—Payments out of corpus for advancement in life of infant—Safeguards.

Re Chapman, 15 O.W.N. 3.

C. Custody.

(§ I C—10)—Child's interest.

The custody of a child will not be given to a mother against the child's interest.

Re Taggart, 39 D.L.R. 559, 41 O.L.R. 85. [Affirmed by Supreme Court of Canada.]

Application of mother—Child in custody of guardian appointed by will of deceased father—Welfare of infant—Ability of mother to undertake care and custody—Infants Act, R.S.O. 1914, ch. 153, secs. 2, 3, 28.

Re Smith, 15 O.W.N. 4.

D. Disabilities and liabilities.

(§ I D—20)—Marriage contract — Nullity—Effect on other provisions.

A minor, a party to a marriage contract, must be assisted by his tutor, and in order to be valid, the matrimonial conventions adopted must have been approved by the family council. Otherwise the marriage contract is null. Such nullity only extends to the matrimonial conventions properly so called, and not to those bound to exist apart from the marriage contract, to which the minor may be a party if represented by his tutor. So, a donation inter vivos, made by a third party to the minor in the marriage contract, is not null, notwithstanding the nullity of the marriage contract itself.

Dufresne v. Dufresne, 54 Que. S.C. 255.

II. Sale, lease or mortgage of real estate.

(See previous Annual Digests.)

III. Actions.

(§ III—40)—Married woman — Separation—Curator.

A wife who is a minor, whether plaintiff or defendant in an action for separation from bed and board, should be assisted by a curator in order to appeal in judicial proceedings.

Verret v. Robitaille, 54 Que. S.C. 228.

INFORMATION.

See Indictment; Summary Conviction; Criminal Law; Intoxicating Liquors.

INFRINGEMENT.

See Copyright; Trademark; Tradename; Patents.

INHERITANCE.

See Descent and Distribution; Wills; Executors and Administrators.
As to taxation, see Taxes.

INJUNCTION.

I. Right to and when granted.
A. In general.
B. Contract rights; covenant.
C. Transfer or disposition of property.
D. Illegal or tortious acts; crimes.
E. Taking of, injury to, or trespass upon, real property.
F. Water rights.
G. As to corporate matters; associations.
H. As to office; elections.
I. Against legal proceedings.
J. Against officers generally.
K. Against taxes or assessments.
L. As to parks, highways and railroads.
M. As to patents, copyrights, trademarks, trade-names and imitations.

II. Interlocutory and interim injunctions.
III. Procedure.

Annotation.

Injunction; when injunction lies: 14 D.L.R. 460.

I. Right to and when granted.

A. In general.

(§ I A—1)—Preserving assets—Appointment of receiver.

When the circumstances are such as to justify the granting of an injunction against the disposition of goods and it appears that an injunction is likely to be ineffective, the Court may go the further step of appointing a receiver to take actual possession of the goods.

Kay v. Ratz (Alta.), [1918] 3 W.W.R. 885, 44 D.L.R. 145, 14 A.L.R. 72.

B. Contract rights; covenant.

(§ I B—26)—School building—Injunction to restrain payment.

The expenditure of money for the erection of a school building having received the sanction of the Local Government Board and a majority of the ratepayers, and the erection of the building having been completed under a contract entered into by the trustees of the school district, and the contractors, the Court has no power to restrain the trustees from proceeding to obtain, if necessary, further authority from the ratepayers to borrow and expend on the contract such further sum as may be necessary to pay the contractor the balance due him on the building.

Lawrence v. Trustees of Beaver Valley School Dist., 43 D.L.R. 318, 11 S.L.R. 429, [1918] 3 W.W.R. 607, reversing, [1918] 3 W.W.R. 71.

Breach of covenant—Restriction upon use of land—Erection and operation of foundry—Unregistered agreement—Purchaser for value without notice—Technical and obsolete restriction—Status of plaintiff to invoke restriction — No damage or likelihood of damage shewn.

Cowan v. Ferguson, 14 O.W.N. 303, affirmed in 15 O.W.N. 425.

M. As to patents, copyrights, trademarks, trade names and imitations.

(§ I M — 116) — Sufficient remedy — Damages.

The Court will not issue an injunction when the mischief complained of can be fully and adequately compensated by a pecuniary sum, or where the granting of the injunction would not do the petitioner any practical good.

Marconi Wireless Telegraph Co. v. Canadian Car & Foundry Co., 43 D.L.R. 382, 54 Que. S.C. 535. [See 44 D.L.R. 378, 18 Can. Ex. 241.]

II. Interlocutory and interim injunctions.

(§ II—130)—Interim order—Inquiry as to damages—Forum — Discretion—Special circumstances.

An application for an order directing an inquiry as to and payment of the damages occasioned to the defendant by reason of an interim injunction obtained by the plaintiff upon the usual undertaking as to damages, and dissolved by the judgment in the action, should be made to the trial Judge. [Smith v. Day (1882), 21 Ch.D. 421, 427; Gault v. Murray (1892), 21 O.R. 458, followed.] Such an application is in the discretion of the Judge. In this case—where the chief point at issue was, whether or not the plaintiffs were liable to assessment and taxation for local improvements—the good faith of the plaintiffs, their duty as trustees to assert what they conceived to be their rights, the importance of the issue as to assessment (involving, as it did, the right of the defendants, a city corporation, to pass the by-law under which they acted), the arbitrary, though legal, conduct of the defendants in laying out the work to the manifest disadvantage of the plaintiffs, and the equally manifest benefit of interested property-owners on the opposite side of the street, and the fact that the dismissal of the action was without costs, were held to be circumstances which warranted the conclusion that, if the defendants had suffered damages by reason of the injunction, they were not such damages as the plaintiffs ought to pay; and the defendants' application for an order for an inquiry and payment was dismissed with costs. Review of the authorities.

Upper Canada College v. City of Toronto, 40 O.L.R. 483. [See 32 D.L.R. 246, 37 O.L.R. 665.]

Interim order — Irreparable loss — Contract for supply of electric energy — Threatened cancellation —Bona fide dispute as to amount due —Terms of granting injunction—Payment into court of amount in dispute.

Ontario Power Co. v. Toronto Power Co., 14 O.W.N. 274.

Motion for interim order—Solvency of defendant—Preponderance of convenience — Adjournment till the trial.

Boutet v. Thibideau, 15 O.W.N. 26.

III. Procedure.

(§ III—135)—Consent judgment—Motion to suspend—Jurisdiction.

The defendants, in 1918, sought an order to suspend for a few weeks the operation of an injunction contained in a consent judgment pronounced in January, 1916:— Held, that the Court had no jurisdiction to make the order. There is no law which enables the Court to sanction the breach of a contract or the violation of a judgment granting an injunction. There is jurisdiction to alter a judgment once entered only when

it does not express the real intention of the Court or when it has been obtained fraudulently. The judgment can be attacked only upon grounds upon which a contract can be attacked—and emphatically so when the judgment is a consent judgment.

Lewis v. Chatham Gas Co., 42 O.L.R. 102.

INNKEEPERS.

(§ V—30)—Lien on baggage—Traveller's samples.

The lien on and right to sell the baggage and property of their guests, boarders or lodgers given to hotelkeepers by art. 1816a of the Civil Code (Que.), does not extend to samples taken to a hotel by a traveller who is not the owner of such goods.

Computing Scale Co. v. Fortin, 41 D.L.R. 136, 53 Que. S.C. 268, 24 Rev. de Jur. 148.

INSANE PERSONS.

I. Who are; inquisition; adjudication.
II. Contracts; deeds.
III. Torts.
IV. Confinement; support in asylum.
V. Suits by or against.
VI. Powers of committee and administration of estate.

I. Who are; inquisition; adjudication.

(§ I—3)—Person alleged to be incompetent to manage her own affairs—Contradictory evidence — Preponderance—Dismissal of application for appointment of committee.

Re Thomas, 15 O.W.N. 185.

Interdiction — Validity of proceedings—Powers of notary.

No provision of the law respecting interdiction gives the right to a tribunal, Judge, or prothonotary, to authorize a notary or any other person to hold meetings of a family council called to give its advice upon an interdiction asked for. An interdiction is of public order and a Court should, ex officio, take knowledge of illegalities with which the proceedings in interdiction are tainted even if the interdicted party has not pleaded them.

Legault v. Legault, 20 Que. P.R. 53.

Interdiction—Chose jugée.

Where a second demand for the interdiction of a person for imbecility is asked for the same reasons as those contained in a first petition rejected five months before, after contestation, and no new facts of insanity are alleged, the last petition will be dismissed on the ground of chose jugée. The Judge has the power to name an alienist for the purpose of examining a person whose interdiction is sought, but it is for him a matter of discretion.

Goltman v. Davidson, 53 Que. S.C. 437.

Costs—Husband and wife.

Nothing in the law authorizes a wife, whose husband asks her interdiction for lunacy, to claim from him provision for her costs of defence.

Goyette v. Clermont, 20 Que. P.R. 224.

II. Contracts; deeds.

(§ II—10)—Deed—Setting aside.

A deed of land will not be set aside on the grounds that the grantor was insane, unless it is proved that he was insane, to the knowledge of the grantee, at the time the negotiations were being carried on and the deed executed.

Conrad v. Halifax Lumber Co. (N.S.), 41 D.L.R. 218.

Agreement—Nullity.

An agreement made by a person interdicted as insane, by which he bound himself to pay $100 to another party, should the latter succeed in freeing him from the asylum in which he was interned, is valueless and non-existent in law. The freedom of an insane person, interned for his own good in an asylum, is not violated, even admitting that all the formalities required for his internment have not been carefully fulfilled. The administration of some one else's business, in order to create obligations in favour of the administrator against that one whose business is managed and who is unable to contract, owing to his age or insanity, should be taken up "usefully" and bring some advantage to the person whose business has been thus managed.

Craig v. Gibault, 53 Que. S.C. 488.

III. Torts.

(See previous Annual Digests.)

IV. Confinement; support in asylum.

(See previous Annual Digests.)

V. Suits by or against.

(§ V—25)—Demand for interdiction—Death—Costs—Revival of action.

A demand for interdiction for insanity, interrupted by the death of the person sought to be interdicted, cannot be revived or continued against the heirs of that person in so far as to arrive at an adjudication upon the costs.

Juneau v. Bergeron, 42 D.L.R. 468, 27 Que. K.B. 300.

Action on mortgage—Stay of proceedings.

The mere fact that a mortgagor is a lunatic and the mortgagee is proceeding to realize upon his mortgage is not a ground for a stay of proceedings; moreover, the rule that in lunacy matters the welfare of the lunatic must be given first consideration, even to the injury of his creditors, does not apply to such a proceeding. [Davies v. Thomas, [1900] 2 Ch. 462, at p. 471, per Rigby, L.J., quoted.]

Re Smith (Alta.), [1918] 2 W.W.R. 540.

VI. Powers of committee and administration of estate.

(§ VI—30)—Expenditures — Charitable purposes.

The Court has, under sec. 12 of the Lunacy Act (R.S.O. 1914, ch. 68), no power to sanction the disbursement of large amounts

for the benefit of charitable and philanthropic schemes.
Re D., 39 D.L.R. 368, 40 O.L.R. 365.

INSCRIPTION (QUE.).

See Appeal; Pleading.

INSOLVENCY.

See Fraudulent Conveyances; Assignment for Creditors; Companies.

INSPECTION.

Of documents, see Discovery.
Right of, see Sale.

INSTRUCTIONS TO JURY.

See Trial; New Trial.

INSURANCE.

I. Companies, officers and agents.
A. Right and manner of doing business.
B. Foreign corporations.
C. Dissolution; forfeiture; insolvency; rights of members of mutual companies.
D. Officers and agents.
II. Insurable interest.
A. In property.
B. In life.
III. The policy or contract.
A. In general.
B. Reformation; rescission.
C. Cancellation; surrender; paid-up policy.
D. Construction.
E. Warranties; representations; conditions; description.
F. Forfeiture.
G. Reinstatement.
H. Premiums and assessments.
IV. Transfer of policy or of interest therein.
A. Assignment generally.
B. Change of beneficiary.
V. Waiver; estoppel.
A. Of insured beneficiary.
B. Of insurer.
VI. The loss; remedies of the assured.
A. Notice; proofs; arbitration.
B. Risks and causes of loss, injury or death.
C. Extent of injury or loss; of recovery.
D. Interest in proceeds.
E. Defences; release.
F. Subrogation.
G. Apportionment or contribution.
H. Actions; enforcing payment.
VII. Reinsurance.
VIII. Guaranty policies.

Annotations.

Insurance; fire insurance; change of location of insured chattels: 1 D.L.R. 745.

Effect of war on enemy insurance companies and enemy's right to claim insurance: 23 D.L.R. 375, 379.

Regulation of foreign insurance companies, constitutionality: 26 D.L.R. 295.

Insurance on mortgaged property: 44 D.L.R. 24.

Policies protecting insured while passenger on public or private conveyances: 44 D.L.R. 186.

Inception of the contract of insurance: 44 D.L.R. 208.

I. Companies, officers and agents.

(See previous Annual Digests.)

II. Insurable interest.

A. In property.

(§ II A—30)—"Insurable interest" — "Direct loss" — Household — Proofs of loss — Time — 60-day period—Conditions.

Upon a fire insurance policy issued by the defendants, insuring household furniture, "the property of the assured or of any member of the assured's family," contained in a certain dwelling-house, the plaintiff was held, to have "an insurable interest" and to be entitled to recover the whole amount of a loss by fire, notwithstanding that he owned only a part of the property insured; the remainder being owned by his father, mother, brothers and sisters, all living in the house as one family. The words "direct loss," as used in an insurance contract, are not intended to exclude such a claim as the plaintiff's; they refer to the nature of the loss or damage—it must not be too remote. [Keefer v. Phœnix Insurance Co. of Hartford (1901), 31 S.C.R. 144, followed.] Held, also, that the "proofs of loss" furnished by the plaintiff became the property of the defendants as soon as the letter containing them, addressed to the defendants, was posted (which was on the 8th January); that was a sufficient delivery of the proofs within the meaning of the statutory condition 18; and, therefore, the period of 60 days, allowed by statutory condition 22 for payment of the loss had expired on the 10th March, when the action was begun, and the action was not prematurely brought; also, that, if the conditions as to proof had not been strictly complied with, the plaintiff was entitled to relief under sec. 199 of the Ontario Insurance Act.

Maldover v. Norwich Union Fire Insurance Co., 40 O.L.R. 532.

III. The policy or contract.

A. In general.

(§ III A—40)—Misdescription of property —Agent.

A wrong description of the property to be covered by a hail insurance policy, carelessly given by the applicant to an agent whose duty consists simply in soliciting and receiving applications and forwarding them to the company, voids the policy.

Doherty v. Canada National Ins. Co., 38 D.L.R. 494, 11 S.L.R. 32, [1918] 1 W.W.R. 366.

(§ III A—42)—Benefit society—By-laws.

A benefit society which has never enforced a rule requiring dues to be promptly paid, but has made it a custom to accept payments

from members in arrears whenever they were willing to pay, cannot invoke such rule in order to escape liability under the conditions of an insurance policy.

Belanger v. L'Union Mutuelle des Voyageurs de Commerce, 43 D.L.R. 90, 24 Rev. de Jur. 426.

(§ III A—48)—Hail insurance—Delivery of policy.

A policy sent to a company's local agent, countersigned by him, and ready for delivery, is in law delivered as an operative policy, and the parties thereto are bound thereby, the company for the risk assumed, and the insured for the premium.

Canada Hail Ins. Co. v. McIsaac, 39 D.L.R. 714, 11 S.L.R. 91, [1918] 1 W.W.R. 896.

C. Cancellation; surrender; paid-up policy.

(§ III C—55)—Surrender of policy—Husband and wife—Independent advice—Life Insurance Policies Act.

The Life Insurance Policies Act, R.S.B.C. 1911, ch. 115, does not require a wife to have independent advice before joining with her husband in the surrender of a policy of insurance taken out by him in her favour, especially where a fund is made of a portion of the premiums paid. Nor unless the circumstances of such surrender bring it within one of the exceptions referred to by Alverstone, C.J., in Howes v. Bishop, [1909] 2 K.B. 390, at 395, is there any rule of law casting upon an insurance company supporting the surrender an onus of showing that the document was adequately explained to the wife or that she had independent advice or sufficient protection.

Moore v. Confederation Life Association (B.C.), [1918] 2 W.W.R. 895.

D. Construction.

(§ III D—65)—Contents of barn—Special clause.

An insurance company insured the plaintiff to the extent of $1,600 against fire in respect of the ordinary contents of a barn. The barn and contents were destroyed by fire, the loss being admitted to be $850. The company contended that, by reason of a term in the application for the insurance that "not more than two-thirds of the cash value of any building or personal property will be insured by this company," its liability was limited to two-thirds of the value of the property destroyed, the application forming part of the contract. The court held that it was unnecessary to consider whether the application was part of the contract or not. The policy insured against loss or damage to the extent of $1,600 to be estimated "according to the true and actual cash value of the property at the time the same shall happen." The assured having applied for $1,600 insurance and having by his application indicated his acceptance of the condition that the company would not insure more than two-thirds of the value, was entitled to rely on this condition and to treat the contract as based on the fact that the amount of insurance granted was within the two-thirds limit. [Youlden v. London Guarantee and Accident Co. (1913), 12 D.L.R. 433, 28 O.L.R. 161; Town of Arnprior v. United States Fidelity and Guaranty Co. (1913), 12 D.L.R. 630, (1914) 20 D.L.R. 929, 30 O.L.R. 618; Sharkey v. Yorkshire Insurance Co. (1916), 54 Can. S.C.R. 92, 32 D.L.R. 711; Beury v. Canada National Fire Ins. Co. (1917), 37 D.L.R. 105, 39 O.L.R. 343, considered.]

Forsyth v. Walpole Farmers Mutual Fire Ass'ce. Co., 43 D.L.R. 503, 43 O.L.R. 236, 14 O.W.N. 256, affirming 14 O.W.N. 114.

Bodily injuries—Property of every description.

A clause added to a policy insuring against bodily injuries that "notwithstanding what is within written this policy is hereby extended to cover loss from liability for damage to property of every description" includes not only the physical injury to property but the loss incident to the inability of a building to perform its usual function while it is being repaired.

N. S. Tramways & Power Co. v. Employers Liability Ass'ce. Co. (N.S.), 40 D.L.R. 297.

(§ III D—65a)—Statutory conditions.

A policy of fire insurance, although purporting to be subject to statutory conditions endorsed thereon, where these have been replaced by later statutory conditions, is in law subject to such later conditions.

Boutry v. North British & Mercantile Ins. Co., 39 D.L.R. 414, 13 A.L.R. 43, [1918] 1 W.W.R. 704.

(§ III D—66)—"While occupied as dwelling"—Store.

A house occupied as a combined store and dwelling is not "occupied as a dwelling," and if a house is unoccupied at the time of a fire therein it is not injured "while occupied as a dwelling" within the meaning of an insurance policy.

Ross v. Scottish Union and National Ins. Co., 39 D.L.R. 528, 41 O.L.R. 108. [Affirmed by Supreme Court of Canada.]

(§ III D—70)—Accidents—"Public passenger conveyance"—Elevator.

A passenger elevator in an office building held not to be a "public passenger conveyance" within the meaning of that term in an accident insurance policy.

Robb v. Merchants Casualty Co. (Man.), [1918] 3 W.W.R. 322, 44 D.L.R. 185, reversing 41 D.L.R. 21, [1918] 2 W.W.R. 371.

E. Warranties; representations; conditions; description.

(§ III E—75)—Incendiarism — Materiality—Notice to agent.

Apprehension of incendiarism is a material fact, and should be made known to the

insurer. Notice of such fact to insurers' general agent is notice to the insurer, and a condition to the contrary in the policy of insurance is unreasonable and non-effective.

Gabel v. Howick Farmers Mutual Fire Ins. Co., 38 D.L.R. 139, 40 O.L.R. 158.

(§ III E—81)—STATUTORY CONDITION—PROPERTY INSURED ASSIGNED WITHOUT WRITTEN PERMISSION OF COMPANY—EFFECT OF WRITTEN PERMISSION FOR EARLIER ASSIGNMENT—LOSS PAYABLE TO MORTGAGEE AS INTEREST MAY APPEAR—ASSIGNMENT OF INTEREST OF MORTGAGEE TO OWNER OF PROPERTY INSURED—MESNE CONVEYANCES.

Staddon v. Liverpool Manitoba Assurance Co., 15 O.W.N. 240.

(§ III E—87)—VACANCY OF BUILDING—MATERIALITY—PROOF OF LOSS—DELAY.

The vacancy and non-occupancy of a building insured against fire, without the consent or the knowledge of the insurer is material to the risk and renders the policy null and void. Where a policy requires that the insured must furnish proof of loss within 60 days after the fire, in the manner and form therein provided, the compliance with these provisions of the policy is a condition precedent to the right of action to recover the loss.

Anderson v. Norwich Fire Ins. Soc., 53 Que. S.C. 409.

(§ III E—91)—CHANGE OF LOCATION—NOTICE—KNOWLEDGE OF AGENT—ESTOPPEL.

In an action to recover a loss on a stock of merchandise the defendant company refused to pay more than its pro rata proportion of the total insurance which had been effected on the property, including four policies effected by companies that refused to contribute on the ground that such policies had been avoided by a change of the location of the goods insured, to which change they had not assented, and of which they had had no notice. Held, that a change of the location of a stock of merchandise insured under policies which assume the risk only when contained in a specified building from the building specified to another avoids the policy absolutely. Such a stipulation is part of and of the essence of the contract, and is not a condition limiting the liability of the company assuring, which is not binding unless set forth in the policy in the manner required by the Insurance Act. The fact that the agent of the companies claiming their policies were avoided by the change of location was aware of the change of location, and that another agent, not having authority to consent to the change, took the policies from the assured with the intention of having the consent of the assurers to the change indorsed thereon, but neglected to do so, will not operate as an estoppel against the assurers claiming that the risk had been avoided.

Arnold v. British Colonial Fire Ins. Co., 45 N.B.R. 285.

(§ III E—100)—ADDITIONAL INSURANCE—CONSOLIDATION OF STOCK.

Where goods contained in two separate buildings are insured in two different companies, the consolidation of the two stocks into one stock does not effect additional insurance within the meaning of the Ontario Insurance Act, R.S.O., 1914, ch. 183, sec. 194 (5).

Rogers v. General Accident Fire and Life Ass'ce. Co.; Rogers v. Mercantile Fire Ins. Co., 42 D.L.R. 656, 42 O.L.R. 419; 14 O.W.N. 49, affirming 13 O.W.N. 175.

80% CLAUSE—COMPROMISE OF CLAIM.

A clause in a fire insurance policy permitting further concurrent insurance up to 80% of the cash value, means that the insured is not entitled to recover upon all the policies together more than 80% of the total value of the goods insured as that value stands at the time of the fire.

Taylor v. Equitable Fire & Marine Ins. Co., 13 A.L.R. 58, [1918] 1 W.W.R. 277, 676.

(§ III E—110)—AUTOMOBILE ACCIDENTS—SAND ON ROAD.

A pile of sand on the roadway is not part of the road-bed and is not within the exceptions contained in an accident insurance policy, insuring an automobile but excluding all loss or damage caused by "striking any portion of the road-bed or by striking the rails or ties of any street, steam or electric railway."

Collins v. Guardian Casualty Co. (B.C.), 40 D.L.R. 133, [1918] 2 W.W.R. 763.

F. FORFEITURE.

(§ III F—145)—LIFE—LAPSE OF POLICY BY NON-PAYMENT OF PREMIUM—EVIDENCE OF REVIVAL—ACCEPTANCE BY AGENT OF PREMIUM AFTER LAPSE—TERMS OF POLICY.

Foxwell v. Policy Holders Mutual Insurance Co., 43 D.L.R. 720, 42 O.L.R. 347

G. REINSTATEMENT.

(§ III G—150)—BENEFICIARY CERTIFICATE—CONSTITUTION AND LAWS OF BENEFIT SOCIETY—MONTHLY ASSESSMENT UNPAID AT DEATH OF MEMBER—REINSTATEMENT NOT APPLIED FOR—ONTARIO INSURANCE ACT, R.S.O. 1914, CH. 183, SEC. 188 (1)—CUSTOM AS TO PAYMENT OF ASSESSMENTS—SUM COMING TO ASSURED UNDER SCHEME FOR DISTRIBUTION OF RESERVE FUND, BUT NOT PAYABLE AT TIME OF DEATH.

Baker v. Order of Canadian Home Circles, 14 O.W.N. 160.

H. PREMIUMS AND ASSESSMENTS.

(§ III H—155)—DELIVERY OF POLICY.

In an action by agents of an insurance company to recover a premium on a policy of accident insurance which the defendant had contracted for before embarking on an ocean steamer, held (per Martin and McPhilips, JJ.A., affirming Cayley, C.C.J., Macdonald, C.J.A., dissenting), that as the

terms of the defendant's application had not been observed, he had stipulated, inter alia, that the policy should be delivered to him before he sailed; it was in fact not written until after he left; although then antedated, the defendant was not liable.

D. E. Brown's Travel Bureau v. Taylor (B.C.), 44 D.L.R. 204, annotated; [1918] 3 W.W.R. 468.

IV. Transfer of policy or of interest therein.

A. Assignment generally.

(§ IV A—160)—Mutual aid society—Beneficiaries — Relationship — By-law against benefits by will.

When the constitution of a mutual aid society only admits blood relations to the benefit of its dotations, the conferring of a certificate of dotation on a nephew by marriage (whom the assured falsely declared to be his sister's son) is illegal and void. (Per Cannon and Belleau, JJ.) A member of a society cannot confer, by will, his dotation in a Mutual Aid Society if the society's by-laws expressly prohibit it. Such prohibition does not constitute a violation of the liberty of the testator, and is not at all contrary to public order.

Dalziel v. L'Ordre des Forestiers Catholiques, 53 Que. S.C. 308.

Husband and wife — Formalities of transfer.

The transfer by a husband of a policy of insurance in favour of his wife, should be made by a declaration endorsed on the back of the policy itself or annexed to it, and a duplicate of the declaration should be delivered to the insurance company, and a memorandum thereof endorsed by the company on the policy or the declaration. If these formalities are not observed the transfer or application is without effect, and does not bind the company.

La Banque d'Hochelaga v. Galibert, 24 Rev. Leg. 479.

Donation by marriage contract—Registration—Service.

The registration of a deed of donation, made to the wife by marriage contract, does not replace the service required by art. 1571, C.C. (Que.), when the object of the donation is a claim. Thus, a creditor, to whom an insurance policy has been transferred for consideration and who has had his transfer served, may claim the amount of the insurance to the exclusion of the insured's widow, who had received the donation of that sum in her marriage contract, which was registered, without any service being made on the insurance company.

La Banque Nationale v. Loiselle, 53 Que. S.C. 154.

B. Change of beneficiary.

(§ IV B—170) — Writing identifying policies.

A bequest to the testator's wife of "the first $75,000 collected on account of policies of life insurance," is ineffective for not "identifying the policies by number or otherwise" as required by the Life Insurance Act, R.S.B.C. 1911, ch. 115, sec. 7.

Arnold v. The Dominion Trust Co., 41 D.L.R. 107, 56 Can. S.C.R. 433, [1918] 2 W.W.R. 25, affirming 35 D.L.R. 145, 24 B.C.R. 321, [1917] 3 W.W.R. 11; 32 D.L.R. 301. [See 32 D.L.R. 33, 44 D.L.R. 12, [1919] A.C. 254, [1918] 3 W.W.R. 850.]

"Infants" — Children — Grandchildren.

By the law of Quebec the word "infants" used in a life insurance policy issued in 1873, whereby insurance money is assigned to the wife and children, includes also the grandchildren.

Lee v. Ætna Life Insurance Co., 39 D.L.R. 294, 53 Que. S.C. 162, 24 Rev. de Jur. 63.

Wife — Foreign divorce — Invalidity — Change of beneficiary by will — Preferred class.

B. obtained a policy of insurance on his life, payable to his wife by name. Some time after the date of the policy she obtained a divorce in a foreign State. By his will, B. gave one-third of the insurance money to his son and one-third each to his brother and sister:—Held, that it was not open to the wife, after the death of B., to maintain that the divorce was invalid. [Swaizie v. Swaizie (1899), 31 O.R. 324; Re Williams and Ancient Order of United Workmen (1904), 14 O.L.R. 482, followed.] Held, also, that when she obtained the divorce she ceased to be in law B.'s wife, and so ceased to be within the preferred class; and B. might, at his will, divert to one not of the preferred class, and so effectively exclude the wife, although the divorce alone would not exclude her.

Re Banks, 42 O.L.R. 64.

Preferred class — Writing — Sufficiency — Will — Printed form — "Personal estate" — Nuncupative will.

The beneficiaries named in an insurance policy on the life of M. were his father, mother, and a brother. M. died leaving a will executed when he was on active service abroad as a soldier. This will was framed by filling up the blanks in a printed form of a "soldier's will." The directions for filling in the blanks and for execution and attestation were in the body of the document, not in the margin. The will as drawn up and executed contained this clause: "My personal estate I bequeath to my wife" (naming her); and beneath the place for the signature, where M. had affixed his signature, and above the testimonium clause, were the printed words: "N.B. Personal estate includes . . . insurance policy, in fact everything except real estate":—Held, that, whether or not this document operated as a will making a valid disposition of the insurance money, it was a declaration under

sub-sec. (5) of sec. 171 of the Ontario Insurance Act, sufficient to effect a valid change in the beneficiary in favour of the wife, one of the preferred class, substituting her for the original beneficiaries. Semble, that, although the nota bene clause was not part of the will, because not intended to be so, it was not to be ignored altogether—it should be taken as explanatory of what was included in the term "personal estate"; and the document might be regarded as a testamentary document supporting the claim of the wife to the insurance money. Secs. 2 12 (2) and 30 of the Wills Act considered. Semble, also, that, if the nota bene clause should be deemed to have been intended to be part of the will, it might be treated as an interlineation, self-evidently made before the execution of the will and above the testimonium clause, and so supporting the wife's claim. But, treating the document as a nuncupative will, under sec. 14 of the Wills Act, the wife was not aided, because that section authorises a disposal of "personal estate" as interpreted by that enactment only.

Re Monkman and Canadian Order of Chosen Friends, 42 O.L.R. 363.

(§ IV B—172)—Change of beneficiary—Preferred class—Declaration in writing — Sufficiency — Soldier's will — Insurance Act — Policy payable in Ontario — Domicile British Columbia.

Re Hewitt and Hewitt, 43 D.L.R. 716, 43 O.L.R. 286.

V. Waiver; estoppel.

B. Of insurer.

(§ V B—180)—Disputing award after arbitration.

The submission to arbitration by agreement between a fire insurance company and the insured to value the property insured and the loss by fire is a waiver of a clause contained in the policy whereby the company could have elected to repair and rebuild the insured property.

Lalande v. Phœnix Insurance Co., 24 Rev. de Jur. 571.

(§ V B—195)—Agent filling in application—Price of animal—Materiality.

While where an applicant for insurance allows an agent to fill in the answers in the application form and signs the same without taking the trouble to read it to see if the answers are correct, the agent should be treated as the agent of the applicant in so doing, yet if the agent does not ask the insured the questions contained in the application form and fills the answers up himself and the applicant signs the document without reading the replies in reliance upon the assurance of the agent that they are all right, then, in the absence of fraud on the part of the agent or of proof that he acted merely for his own private ends, the knowledge of these facts must be imputed to the company, which, after acceptance of the premium and the issue of the policy must be considered both to have waived the materiality of the questions and to be estopped from insisting upon an agreement in the application form constituting the insurance agent the agent of the applicant. [Per Fitzpatrick, C.J., and Idington, J., approving of reasons of Appellate Division, [1917] 1 W.W.R. 1159, 32 D.L.R. 756.] The price paid for an animal, although important for the purpose of checking its value at the time of an application for insurance thereon, and thereby preventing over insurance, is not an absolute criterion of the value, for first there must be considered the time which has elapsed since the purchase was made, and secondly, an animal, like anything else, may be bought cheap (per Fitzpatrick, C.J.).

Whitney v. Great Northern Ins. Co. (Can.), [1918] 2 W.W.R. 167, 44 D.L.R. 433, 57 Can. S.C.R. 543, affirming 32 D.L.R. 756, 10 A.L.R. 292.

VI. The loss; remedies of the assured.

A. Notice; proofs; arbitration.

(§ VI A—245)—Relief from—Pleading.

In an action upon a policy of fire insurance the plaintiff may be relieved, on the ground of mistake, under the Fire Insurance Policy Act, R.S.S. 1909, ch. 80, from the effects of his failure to give notice and proofs of loss, although he has not pleaded the Act. [Bell Bros. v. Hudson's Bay Ins. Co., 44 Can. S.C.R. 419; Shepard v. British Dom. Gen. Ins. Co., [1918] 1 W.W.R. 85, followed.]

Pachal v. Germania Fire Ins. Co. (Sask.), [1918] 1 W.W.R. 502.

Proofs of loss—Overestimation of value of stock of goods destroyed or damaged—False statements not amounting to fraud or dishonesty—Actions on policies—Time for commencement—Lapse of 60 days after completion of proofs—Failure to separate damaged from undamaged goods—Assessment of loss—Reduced estimate—Costs of actions.

Babayan v. Phœnix Insurance Co., 14 O.W.N. 17.

Conditions — Accounts and invoices — Production — Proof of loss — Falsity.

A statutory condition of a fire insurance policy that the insured shall in support of his claim, if required and if practicable, produce books of account and furnish invoices and other vouchers, does not make the procuring and production of copies of invoices a condition precedent to his right of action. [Strong v. Crown Fire Insurance Co., 13 D.L.R. 686, followed.] To justify holding an assured guilty of having made a false or fraudulent statement in his proof of loss the evidence ought to be clear and satisfactory, and leave no room for any reasonable inference but that of guilt, and where evidence that the assured had made an excessive estimate of his loss is relied upon as proof of his fraudu-

lent intent, the estimate should be so extravagant as to lead necessarily to the conclusion that the excess was due, not to an error of judgment, but to an intention to defraud. [Adams v. Glen Falls Ins. Co., 31 D.L.R. 166, followed.] A wilfully false statement of value in the statutory declaration of loss under a fire insurance policy vitiates the claim. [Maple Leaf Milling Co. v. Colonial Assur. Co., 36 D.L.R. 202, followed.] And where a building and a stock of goods therein are insured under one policy, such a statement with respect only to the value of the building defeats the entire claim. [Harris v. Waterloo Mutual Fire Insur. Co., 10 O.R. 718, followed.]

Kibzcy v. Home Insurance Co. (Man.), [1918] 2 W.W.R. 541.

COMPENSATION — ARBITRATION — AWARD — ACQUIESCENCE—REPAIRS—MANDATE.

A fire insurance company, acting by its agent, which agrees to an arbitration to determine the compensation, an assured is entitled to on the burning of his building and names its arbitrator and furnishes him with all the necessary signatures in blank and other papers, gives the assured sufficient reason for believing that its agent and its arbitrator are authorized to allow him to begin urgent repairs to the property burned, before the award is made. An award bearing the signatures of the arbitrators is, under such circumstances, not void because it has not been received by a notary, seeing that this obligation is incumbent as much on the defendant as on the plaintiff, and that the representative of the latter had taken possession of it and sent it to the company's agent. When an insurance company has agreed to have arbitrators determine the compensation due to an assured, it cannot afterwards revoke the submission to arbitration, or invoke the right which the conditions of the policy give the company to make the repairs on the insured building which the fire has rendered necessary.

Lalande v. Phœnix Insurance Co., 54 Que. S.C. 461.

B. RISKS AND CAUSES OF LOSS, INJURY OR DEATH.

(§ VI B—257)—LOSS OR DAMAGE BY FIRE OR LIGHTNING — EVIDENCE — DAMAGE BY WIND—PROXIMATE CAUSE.

The plaintiff was insured by the defendants against all such immediate loss or damage, not exceeding the face amount of the policy, as should happen by fire or lightning to his property specified. On a day during the currency of the policy, there was a violent storm; and, according to the evidence of the plaintiff, his wife and son, who were the only eye-witnesses, his barn was struck by lightning, and the roof and part of the wall at one end of the barn were thereby torn away; and, almost immediately thereafter, a wind came with such violence that it tore down the greater portion of the structure then standing, and the barn and contents—being part of the property specified—were substantially damaged. There was no fire:—Held, that the evidence of the eye-witnesses, who were apparently credible, was to be preferred to the theoretical testimony of a scientific gentleman, who said that, owing to the fact that the building was covered with metallic shingling and siding, it would be impossible for the lightning to have caused the destruction attributed to it; and it should not be found that the entire damage was occasioned by the wind; also, that, although the great bulk of the destruction was occasioned by the wind, the plaintiff's recovery upon the policy should not be confined to the immediate result of the lightning stroke. Where an injury within the policy continues and further damage results from a cause which alone would not have caused the damage, the further damage may be regarded as proximately caused by the original injury. [Reischer v. Borwick, [1894] 2 Q.B. 548, followed.] The test is, whether there was a sufficient interval to allow the first cause to be regarded as having entirely ceased to operate by reason of an opportunity to repair. The injury caused by the lightning was, throughout, an operating and continuing cause, and a proximate cause within the meaning of the rule which requires the Court to look at the immediate cause of the loss or damage, and not at some remote or speculative cause.

Roth v. South Easthope Farmers Mutual Fire Insurance Co., 41 O.L.R. 52, varied in 15 O.W.N. 176.

(§ VI B—260)—PRESUMPTION OF DEATH OF INSURED — ORDER DECLARING — PAYMENT OF INSURANCE MONEY TO BENEFICIARY—COSTS.

Re Traynor and Catholic Mutual Benefit Ass'n., 14 O.W.N. 90.

(§ VI B—270)—DEFENCE OF SUICIDE — EVIDENCE.

In an action upon life insurance policies wherein the defence of suicide was set up, held, contrary to the view of the trial Judge, that the evidence proved such defence.

Dominion Trust Co. v. New York Life Ins. Co. (P.C.), [1918] 3 W.W.R. 850, 44 D.L.R. 12, [1919] A.C. 254, affirming 32 D.L.R. 33, 23 B.C.R. 343.

(§ VI B—275)—COMPLETION OF POLICY—TENDER—ACCEPTANCE.

A contract of insurance is complete only when the company has tendered a policy which has been accepted by the assured. [Sharkey v. Yorkshire Insurance Co., 28 D.L.R. 191, affirmed 32 D.L.R. 711, referred to.]

Robinson v. London Life Ins. Co., 42 D.L.R. 699, 42 O.L.R. 527.

(§ VI B—290)—TOTAL DISABILITY CLAIM—CAUSE OF INJURY — ASSAULT —"EXTERNAL FORCE"— — VOLUNTARY OR UNNECESSARY EXPOSURE — CHANGE OF OCCUPATION — IMMATERIALITY IN RE-

GARD TO RISK — QUESTION OF FACT — FINDING OF TRIAL JUDGE — INSURANCE ACT, SEC. 156 (6)—RENEWAL OF POLICY.

Morran v. Railway Passengers Assurance Co., 44 D.L.R. 647, 43 O.L.R. 561. 15 O.W.N. 68, affirming 13 O.W.N. 358.

C. EXTENT OF INJURY OR LOSS; OF RECOVERY.

(§ VI C—358)—INDEMNITY AGAINST LOSS OR DAMAGE BY FIRE OR LIGHTNING—BUILDING PARTLY TORN BY LIGHTNING STROKE WITHOUT FIRE—FURTHER INJURY BY WIND FOLLOWING ALMOST IMMEDIATELY—EVIDENCE—LIABILITY OF INSURERS FOR DAMAGE CAUSED BY WIND—PROXIMATE CAUSE—FINDING OF FACT OF TRIAL JUDGE — APPEAL — CONTENTS OF BUILDING—NEGLECT TO PUT IN SAFE PLACE — DAMAGE BY RAIN — VARIATION OF JUDGMENT—COSTS.

Roth v. South Easthope Farmers Mutual Fire Insurance Co., 15 O.W.N. 176, varying 13 O.W.N. 208, 41 O.L.R. 52.

D. INTEREST IN PROCEEDS.

(§ VI D—365)—CARGO—RIGHT OF ACTION AGAINST WRONGDOER.

The owner of a cargo lost in transit who has received from an insurance company the full value of the cargo, covered by the insurance policy, has a sufficient interest to maintain an action against the person whose negligence caused the loss, such owner being under obligation to account to the insurance company for whatever can be recovered from the wrongdoer.

Alex. McFee & Co. v. Montreal Transportation Co., 42 D.L.R. 714, 27 Que. K.B. 421.

(§ VI D—395)—ASSOCIATION — MEMBERSHIP BENEFITS — CLAIMANTS — UNIVERSAL LEGATEE.

Where the by-laws of an association and certificate of membership showed that the association was bound to pay a member a certain sum, on his death, either to his widow or his beneficiary or his heir, but did not state which of the three should have the preference, it was held that such right formed, at his death, part of his estate, in the absence of any by-law to the contrary, and that such right and the debt belonged to the universal legatee of the member.

Piche v. L'Union St. Joseph de Lachine, 24 Rev. de Jur. 307.

H. ACTIONS; ENFORCING PAYMENT.

(§ VI H—415)—INSANE BENEFICIARY — ORDER FOR PAYMENT — HOSPITALS FOR INSANE ACT.

The provision of sec. 36 of the Hospitals for the Insane Act override pro tanto those of sec. 176 (2) of the Ontario Insurance Act, as enacted by 4 Geo. V., ch. 30, sec. 10. An order was made for payment to the Inspector of Prisons and Public Charities, instead of into Court, of insurance moneys to which an insane person, confined in a public hospital for the insane, was entitled.

Re Nash and Canadian Order of Chosen Friends, 40 O.L.R. 530.

(§ VI H—420)—ACTION AGAINST MUTUAL BENEFIT ASSOCIATION — CHARTER REQUIREMENTS.

If a member of a mutual benefit association sues the association without complying with the preliminary formalities required by its charter, that ground may be invoked in the plea to the merits and not in an exception to the form.

Marquis v. Montreal Fireman's Benefit Asso., 19 Que. P.R. 222.

(§ VI H—425)—PROOFS OF LOSS — RELIEF AGAINST—DELAY IN BRINGING ACTION.

Sec. 86 of the Saskatchewan Insurance Act permits relief to be granted from strict compliance with a condition in the policy requiring proof of loss to be furnished as soon as practicable after the loss has occurred. The granting of such relief does not relieve against another clause in the policy providing that a certain time shall elapse after completion of the proofs before the loss becomes payable, or before action can be brought to recover the amount of the policy, notwithstanding that such delay would bar the action, as not being brought within one year after the loss or damage occurred.

Shepard and Merchants Bank v. British Dominions General Ins. Co.; Shepard and Merchants Bank v. Glens Falls Ins. Co., 42 D.L.R. 746, 11 S.L.R. 259, [1918] 2 W.W.R. 985, reversing 10 S.L.R. 421, [1918] 1 W.W.R. 85. [Appealed to Supreme Court of Canada.]

LIMITATION OF ACTION.

If the payment of an insurance policy has been delayed by reason of claims made by various persons claiming to be transferees of the policy, a beneficiary may bring his action after the year from the death.

Dufresne v. Crown Life Ins. Co., 19 Que. P.R. 46.

VII. Reinsurance.

(See previous Annual Digests.)

VIII. Guaranty policies.

(§ VIII—436)—AGAINST EMPLOYER'S LIABILITY — PROCEDURE — DILATORY EXCEPTION—WARRANTY.

A provision in an insurance policy against work accidents, by which the insured is required, in case of an action before the Courts, to turn the case over to the insurer so that the latter may contest it on behalf of the insured, amounts to an agreement not to call in the insurer in incidental warranty. Under such conditions the insured cannot exercise the recourse of an action in incidental warranty, nor suspend for that purpose the main action by way of dilatory exception.

Dufresne v. Parent, 53 Que. S.C. 223.

IMMEDIATE NOTICE OF ACCIDENT — CONDITIONS—REMEDY.

A condition in a policy of insurance against accidents during work requiring the insured to give immediate notice of the accident, obligates him to give such notice with diligence, having regard to the particular

circumstances of the accident. When the fatal results of an accident showed themselves some days later, a notice given by the assured the day that he was informed of the gravity of the consequences, satisfies that condition in the policy, that "if a law-suit is brought against the assured, the company at its own expense, will undertake the defence in the name of the assured, or will settle the claim; that no action shall be brought by the assured for the recovery of losses covered by this policy except for losses sustained and paid in cash by him in settlement of a judgment pronounced after a trial," are connected and co-relative one with the other; and if the insurer does not fulfil his obligation to defend the assured, the latter is freed from his undertaking not to take action against the insurer.

Parent v. Merchants Assurance Co., 54 Que. S.C. 106.

INTENT.

See Contracts; Criminal Law; Wills; Statutes.

INTEREST.

I. When recoverable.
- A. In general, on contracts.
- B. On debts, loans and advances.
- C. As damages; on amount recovered as damages.
- D. On judgments; verdicts; awards.
- E. On legacies and annuities; claims of distributees.
- F. Liability of officer, receiver, trustee or personal representative.
- G. Liability of province, county or municipality.
- H. Necessity and effect of demand.

II. Computations; amount; rate; frequency of payment.
- A. In general.
- B. Rate.

III. Compound interest.

Annotations.

Statement of rate of interest in land mortgage: 32 D.L.R. 60.

Rate of interest that may be charged by banks: 42 D.L.R. 134.

I. When recoverable.

A. In general; on contracts.

See Mortgage; Usury.

(§ I A—1)—Threshing contract—Demand for payment—Time.

Interest on the amount claimed under a threshing contract allowed, from the date of the delivery of defence, there being an absence of clear evidence as to when demand for payment was made or as to when full particulars of the plaintiff's claim were delivered.

Dusbabek v. Bjornstad (Sask.), [1918] 3 W.W.R. 79.

Sale of goods — Pleadings — Amendment—Payment—Costs.

A judgment for the price of goods sold and delivered and interest thereon sustained on the ground that, although the plaintiff could succeed as to interest only by an amendment to the statement of claim showing facts entitling her to interest under the statute and no such amendment was made, yet the trial Judge must have intended to allow interest only by virtue of some such amendment, and therefore his discretion in allowing interest should not be interfered with; but, the defendant having paid into Court an amount sufficient to satisfy the claim on the issues raised by the pleadings as they were at the time of payment in, it was held that the plaintiff was entitled to costs only up to and including such payment into Court.

Styles v. Henderson (Man.), [1918] 2 W.W.R. 394.

D. On judgments; verdicts; awards.

(§ I D—35)—Judgment — Prescription — Registration.

Interest upon judgment is only prescribed by 30 years as capital; and, notwithstanding art. 2124 C.C. (Que.), the registration of a judgment preserves the right of preference attached to the title for interest accrued since the judgment without other limitation than the period of prescription.

Campeau v. Roy, 54 Que. S.C. 237.

II. Computation; amount; rate; frequency of payment.

B. Rate.

(§ II B—65)—Statement of rate—Mortgage.

A clause in a mortgage of real estate that "It is further agreed . . . that the principal is $700 and the rate of interest chargeable thereon is 10 per cent. per annum as well after as before default" is a sufficient statement of the amount of the principal and interest to satisfy the requirements of sec. 6 of the Interest Act (R.S.C. 1906, ch. 120).

Standard Reliance Mortgage Co. v. Stubbs, 38 D.L.R. 435, 55 Can. S.C.R. 422, [1917] 3 W.W.R. 402, reversing 32 D.L.R. 57, 27 Man. L.R. 276.

A special statement in a mortgage on real estate complete in itself, of the amount of the principal and rate of interest calculated, is not required by sec. 6 of the Interest Act (R.S.C. (1906), ch. 120); it is sufficient if the facts stated in the mortgage show the principal amount and the rate of interest chargeable thereon.

Canadian Mortgage Investment Co. v. Cameron, 38 D.L.R. 428, 55 Can. S.C.R. 409, [1917] 3 W.W.R. 521, reversing 33 D.L.R. 792, 11 A.L.R. 441.

Loans — Stipulated rate — Voluntary payments—Recovery back.

A stipulation for interest at a certain rate on a loan "until paid" imports a contract to pay interest at the specified rate only until the maturity of the loan. To carry the contract for the stipulated rate beyond the maturity of the loan, explicit terms so providing must

be made. Payments at the higher rate voluntarily made can not be recovered back.

Hossack v. Shaw, 42 D.L.R. 130 (annotated), 56 Can. S.C.R. 581, reversing, in part, 39 D.L.R. 797, 40 O.L.R. 475, reversing 36 D.L.R. 760, 39 O.L.R. 440.

AGREEMENT TO REPAY LARGER SUM—DIFFERENCE AS INTEREST — "BLENDED" PAYMENT.

Where in consideration of a present advance of money the borrower agrees to pay the lender a certain larger amount at a future date, the difference between the amount lent and the amount to be paid by the borrower is interest, but the transaction is not one which comes under sec. 6 of the Interest Act, R.S.C. 1906, ch. 120, for the payment of a sum made up by the mere addition of interest to principal, the amounts due in respect of principal and interest respectively being clearly distinguishable, is not a "blended" payment within the meaning of said section.

Cummings v. Silverwood, [1918] 3 W.W.R. 629, 11 S.L.R. 407.

III. Compound interest.

(See previous Annual Digests.)

INTERIM INJUNCTION.

See Injunction, II.

INTERLOCUTORY ORDERS.

See Judgment; Appeal; Injunction.

INTERNATIONAL LAW.

See Conflict of Laws.

Foreign judgments, see Judgments.

Status of aliens, see Aliens.

Foreign corporations, see Companies; Insurance; Constitutional Law.

Annotation.

Status of aliens during war: 23 D.L.R. 375.

INTERPLEADER.

Annotation.

Summary review of the law of interpleader: 32 D.L.R. 263.

(§ I—10)—BY SHERIFF—RIGHT OF APPEAL.

An interpleader by a sheriff who has seized goods in an action is to be considered a proceeding in such action, not a separate action, and no appeal lies from a District Court if the amount in controversy in such action is less than the amount in respect of which the District Courts Act (Sask.), grants a right of appeal, though the value of the goods seized may exceed such amount.

Royal Bank of Canada v. Banque D'Hochelaga, 40 D.L.R. 4, 11 S.L.R. 101, [1918] 1 W.W.R. 880.

EXECUTION CREDITOR—PRACTICE.

In interpleader proceedings the execution creditor should be made the plaintiff regardless of where the possession of the goods is.

Dickson v. Podersky, 39 D.L.R. 584, 13 A.L.R. 110, [1918] 1 W.W.R. 636.

(§ II—20)—RIGHT TO—RULE 489—ADMISSION BY FIRE INSURANCE COMPANY AS TO PART — MORTGAGEE — LIENHOLDERS — PRIORITIES BETWEEN—MECHANICS' LIEN ACT.

Liverpool & London & Globe Ins. Co. v. Kadlac, 41 D.L.R. 700, 13 A.L.R. 498, [1918] 2 W.W.R. 727, affirming, [1918] 2 W.W.R. 429.

INTERPRETATION.

See Contracts; Insurance; Wills; Deeds; Statutes.

INTERROGATORIES.

See Witnesses; Depositions; Discovery.

INTERVENTION.

See Parties.

INTESTACY.

See Descent and Distribution; Wills; Executors and Administrators.

INTOXICATING LIQUORS.

I. PROHIBITION AND REGULATION; STATUTES, BY-LAWS AND ORDINANCES.
- A. In general.
- B. Conditions of business.
- C. Local option.

II. LICENSES.
- A. In general.
- B. Discretion as to granting.
- C. Contest; remonstrance; renewal.
- D. Cancellation; revocation; forfeiture.

III. UNLAWFUL SALES; OFFENCES AND PROCEEDINGS.
- A. In general.
- B. Sales by clubs and their agents.
- C. Sales by agent, clerk or partner.
- D. By druggists.
- E. To prohibited persons.
- F. Prohibited hours and days.
- G. Place of sale or possession.
- H. Seizure and destruction.
- I. Trial of offenders.
- J. Second and subsequent offences.

IV. CIVIL REMEDIES.
- A. In general; nuisances.
- B. Civil damages.

Conviction for offences, see Summary Conviction. Review of proceedings, see Appeal; Certiorari; Habeas Corpus.

I. Prohibition and regulation; statutes, by-laws and ordinances.

A. IN GENERAL.

(§ I A—5)—FEDERAL LAW — ORDERS-IN-COUNCIL—PROVINCIAL LAWS.

The prohibitory liquor regulations under order-in-council No. 589 Can., passed under the War Measures Act, 1914, Can., do not apply where the offence could be prosecuted under a provincial liquor law, as the order-in-council itself declares the regulations are to be construed as supplementary to the prohibitory laws in force in the provinces.

Rex v. Stone (Alta.), 30 Can. Cr. Cas. 11, [1918] 3 W.W.R. 1.

The regulations issued under the Dominion order-in-council No. 589, as supplementary of the provincial prohibition Acts have no application to a transaction which is a contravention of the Alberta Liquor Act, and where the facts constitute an offence under the provincial law the charge must be laid thereunder and only the penalties thereby provided imposed.

Rex ex rel Turner v. Stone (Alta.), [1918] 3 W.W.R. 1, 30 Can. Cr. Cas. 11.

II. Licenses.

A. In general.

(§ II A—35)—Customs — Illegal tax — Recovery—Yukon.

Under the provisions of the statutes relating to the Yukon Territory the Dominion Government has the power to exact a fee for the granting of a permit for the importation or bringing in of intoxicating liquors in the Territory; such exaction is a mere charge for the granting of the permit and not in the nature of customs duties or tax within the provision of the Customs Act (R.S.C. 1906, ch. 48, sec. 130). Where such a charge has been illegally imposed but paid voluntarily it cannot be recovered back.

Lowe v. The King, 40 D.L.R. 686, 17 Can. Ex. 126.

Beer license—Premises.

A beer license issued under the Intoxicating Liquor Act (N.B. 1916, ch. 20, sec. 180) authorizes the holder to sell beer or non-intoxicating drinks only on the premises described in it. The holder of such license has no right of appeal as a licensee against a conviction for permitting drunkenness on separate premises owned and occupied by him as a moving picture theatre.

The King v. Cady, 41 D.L.R. 630, 45 N.B.R. 474.

B. Discretion as to granting.

(§ II B—40)—Inspector.

The Intoxicating Liquor Act, N.B., 1916, as amended by 8 Geo. V., ch. 22 (9), gives the chief inspector power to investigate the merits of applications for beer licenses, and to grant or refuse them in his discretion.

Ex parte McFarlane, 39 D.L.R. 187, 45 N.B.R. 318.

III. Unlawful sales; offences and proceedings.

A. In general.

(§ III A—55)—"Having" liquor not in dwelling house.

A conviction under sec. 49 of the Manitoba Temperance Act, 6 Geo. V., Man., ch. 112, for "having" liquor in a place other than a dwelling house cannot be supported against the proprietor of a licensed pool-room because of the possession and use of liquor by another person, not being his servant or agent, who was lawfully on the premises for the purpose of playing pool and who had brought the liquor there in his pocket and used the same without the connivance or consent of the proprietor. [R. v. Borin, 22 Can. Cr. Cas. 248, 15 D.L.R. 737, 29 O.L.R. 584, applied.]

Rex v. Hoffman, 38 D.L.R. 289, 28 Man. L.R. 7, 28 Can. Cr. Cas. 355.

Possession of liquor for purpose of exportation — Enabling statute — Ultra vires.

Rex v. Western Wine & Liquor Co. (Alta.), 39 D.L.R. 397, 29 Can. Cr. Cas. 307, [1918] 1 W.W.R. 55.

Unlawful possession—Possession elsewhere than as charged.

Rex v. Laderoute (Alta.), 29 Can. Cr. Cas. 299.

Ontario Temperance Act—Having liquor in place other than private dwelling-house — Evidence — Question for magistrate—Motion to quash conviction.

Rex v. Rosarri, 29 Can. Cr. Cas. 297, 14 O.W.N. 117.

(§ III A—56)—Permitting drunken persons in hotel.

A summary conviction of an hotelkeeper for permitting drunken persons to meet on his premises (Liquor Act, Alta., 1916) will be quashed if the evidence shews that the hotelkeeper did everything which could reasonably be expected during severe weather conditions in getting the drunken persons to leave the hotel without placing them in peril by an immediate ejectment.

Rex v. Creighton (Alta.), 29 Can. Cr. Cas. 161.

(§ III A—58) — Carrier — Delivering liquor to person not entitled to sell—Proof—Inference from facts.

Sec. 49 of the Ontario Temperance Act, 6 Geo. V., ch. 50, applies to a carrier. The defendant, a carrier of goods for hire, was convicted by a police magistrate of an offence against sec. 49, by delivering intoxicating liquor to a "person not entitled to sell liquor and who sells such liquor." There was no direct evidence that the person to whom the defendant delivered the liquor was one who bought for the purpose of reselling; and it was argued, upon a motion to quash the conviction, that the magistrate could not, upon the evidence, find affirmatively that the recipient was one who bought for the purpose of reselling; but it was held, that the magistrate could, from the facts proved, properly draw the inference that the recipient bought for that purpose. It appeared that the transaction was a clandestine one; that what was delivered was a keg containing eight gallons of whisky; and that a false name was used in shipping. The motion was dismissed.

Rex v. McEwan, 41 O.L.R. 324, 30 Can. Cr. Cas. 212.

B. Sales by clubs and their agents.

(§ III B—60)—Club building — Jurisdiction of magistrate.

On an information under the Nova Scotia

Temperance Act against a member of a club for unlawfully keeping liquor in the club building, the question is one of fact to be determined by the stipendiary magistrate, no question of jurisdiction arises on which a writ of prohibition can issue. [Hawes v. Hart, 18 N.S.R. 42, distinguished.]

The King ex rel. Burns v. Fielding, 40 D.L.R. 246, 52 N.S.R. 98, 29 Can. Cr. Cas. 293.

C. Sales by agent, clerk or partner.

(§ III C—67)—Soliciting orders — Distribution of circulars.

The defendant undertook the distribution of certain circulars in a city. He employed a man, who left at the houses of citizens envelopes with enclosures. Each envelope had upon it the name and address of a person in Buffalo, New York. Enclosed in each envelope was a list of alcoholic liquors and the name of the person in Buffalo. On the back of the list was a form of order, addressed to the person in Buffalo. The agent knew what was in the envelopes—the actual distributor did not. Neither of them took orders, nor was either of them authorised to do so:—Held, that what was done amounted to soliciting orders for beverage purposes, within the meaning of sec. 42 of the Ontario Temperance Act, 6 Geo. V., ch. 50; and a motion to quash a magistrate's conviction of the defendant for an offence against that section was dismissed.

Rex v. Lynch-Staunton, 41 O.L.R. 317, 30 Can. Cr. Cas. 209.

D. By druggists.

(§ III D—70)—Medicated wine.

A patent medicine registered under the Proprietary and Patent Medicine Act (1908, ch. 56, Dom.) which contains more than 2½% proof spirits, but is so medicated as to cause nausea and sickness before intoxication is not an intoxicating liquor within the meaning of the Alberta Liquor Act (1916, ch. 4, sec. 23).

Rex v. Maclean, 40 D.L.R. 443, 13 A.L.R. 244, 29 Can. Cr. Cas. 270, [1918] 2 W.W.R. 154.

Proprietary Medicines Act—Manufacturer's license—Company.

A manufacturer's certificate granted under the Proprietary Medicine Act, Can., for the manufacture of invalid port wine containing a high percentage of alcohol, is not available by way of justification for the manufacture of the same product by a company other than the registered one, even with the latter's consent, where the manufacture and sale would infringe a provincial liquor law but for the registration.

Rex v. Redman (Sask.), 29 Can. Cr. Cas. 304, [1918] 1 W.W.R. 572.

Corporation as druggist—"Liquor"—Patent Medicine Act.

The defendant, a corporation, kept a drug-store at Regina, and in the course of business sold a liquid known as "Kennedy's Tonic Port." A magistrate convicted the defendant of selling liquor contrary to the Saskatchewan Temperance Act (1917, ch. 23), and imposed a fine of $100 under sec. 24 of the Act, holding the defendant to be a druggist and therefore within that section. The defendant appealed. Held, that as the evidence shewed that the liquid contained more than two and one-half per cent. of proof spirits, it must be "conclusively deemed to be intoxicating" under sec. 2 (1) of the Act, and as the evidence further showed that it was capable of human consumption, it was "liquor" within the meaning of that Act. That as the defendant being a corporation was not capable of registration under the Pharmacy Act, it was not a druggist and was not therefore within the protection of the order-in-council of the province of Saskatchewan of April 24, 1917, nor was it indeed within the protection of that order-in-council on the evidence as the liquid did not contain "sufficient medication or sufficient treatment to prevent its use as an alcoholic beverage." That since the enactment of 7 & 8 Geo. V., ch. 30 (4d), registration under the Proprietary or Patent Medicine Act, 7 & 8 Edw. VII., ch. 56 (Dom.), is not an answer to a charge of want of compliance with a provincial statute. That the defendant had been properly convicted, but not being a druggist the minimum fine that could be imposed was $500 as provided by secs. 26 and 27, and that its fine must be increased accordingly.

Rex v. Campbell's Pharmacy, 11 S.L.R. 231, [1918] 2 W.W.R. 794.

Physician — Prescriptions — Admissibility of evidence.

The defendant, a practising physician, was convicted by a magistrate of an offence against the Ontario Temperance Act, 1916, 6 Geo. V., ch. 50, sec. 51, as amended by the Ontario Temperance Amendment Act, 1917, 7 Geo. V., ch. 50, sec. 18, by giving to one M. a prescription for one pint of alcohol, in evasion and violation of the Act, and for the purpose of enabling and assisting him to evade the Act and to obtain intoxicating liquor for use as a beverage:—Held, that evidence tending to establish that the defendant had issued a great number of requisitions for potable liquor for bathing purposes, was properly admitted by the magistrate. Where the question of motive is involved, such evidence is admissible; and the question for the magistrate was, whether the defendant was acting honestly as a physician, or dishonestly, and intending to assist in the distribution of intoxicating liquor contrary to the statute. [Makin v. Attorney-General for New South Wales, [1894] A.C. 57, followed.] And held, that the question of bona fides was for the magistrate, and his finding could not be reviewed on a motion to quash the conviction. The defendant, in filling up the prescription for M. and other prescriptions, had not complied with the Act: the name of the patient and the nature of the illness must

be stated so that the bona fides may be tested.

Rex v. Welford, 42 O.L.R. 359, 30 Can. Cr. Cas. 156.

ONTARIO TEMPERANCE ACT—MAGISTRATE'S CONVICTION FOR OFFENCE AGAINST SEC. 51 — PHYSICIAN — PRESCRIPTION — "ACTUAL NEED"—EVIDENCE.

Rex v. Rankin, 15 O.W.N. 29.

PRESCRIPTIONS BY PHYSICIANS—"ACTUAL NEED"—FISHING TRIP.

In sec. 32 of the Liquor Act, ch. 4, 1916, which provides for the giving by physicians of prescriptions for liquor, the words "actual need" are not limited to a sickness existing at the moment, but also cover the case where in the bonâ fide opinion of the physician a prescription is justified as a proper precaution against or relief from ailments to which the patient is or is likely to be exposed (per Beck, J.). A physician was applied to for a prescription for intoxicating liquor. In answer to a question by the physician, the applicant stated that he was not sick but was going on a fishing trip. The physician made no attempt to ascertain whether the applicant was, in the physician's judgment, in need of treatment, but furnished him with the prescription. The applicant was a stool-pigeon. On the trial of a charge under sec. 32 of the Liquor Act, ch. 4, 1916, for "givinga prescription for intoxicating liquor for the purpose of enabling Tiderington (the informant) to obtain liquor for use as a beverage," the physician admitted that he had in the course of five or six weeks given over 400 prescriptions for liquor. He was convicted and an application by way of certiorari was made to quash the conviction. Held, that the application should be dismissed.

Rex ex rel. Tiderington v. Rose (Alta.), [1918] 3 W.W.R. 950.

PENALTY—APPEAL.

There is no appeal from a conviction under the Intoxicating Liquor Act (1916 N.B., ch. 20, sec. 176 (1)) in cases where a pecuniary penalty is provided, although default in payment of the fine imposed may be followed by imprisonment.

The King v. Doherty, 42 D.L.R. 102, 45 N.B.R. 461.

E. To prohibited persons.

(§ III E—77)—INDIAN RESERVE—INVALID CONVICTION—CERTIORARI.

Where a justice of the peace sentenced the petitioner to 2 months imprisonment for having intoxicating liquor in his possession on an Indian Reserve, a writ of certiorari was upheld and the conviction quashed on the grounds that: (1) the complaint was not made in writing; (2) the sentence was pronounced June 2, but the record showed no adjournment, from April 4 to that date, made in the presence of the petitioner, which constituted a sufficient irregularity to quash the conviction.

Nagazoa v. Niquet, 24 Rev. de Jur. 339.

(§ III E—79)—DUPLEX HOUSE — PRIVATE DWELLING—ONTARIO TEMPERANCE ACT.

Rex v. Carswell, 43 D.L.R. 715, 42 O.L.R. 34.

G. Place of sale or possession.

(§ III G—85)—LIMITATIONS—AMENDING INFORMATION..

By reason of the time limitation of the Nova Scotia Temperance Act, N.S. Acts 1910, ch. 2, it is not permissible to amend an information so as to include in the period of illegally keeping liquor for sale to be covered thereby, any portion of time more than three months prior to the amendment. A charge cannot be brought in by amendment to an untried information as to which a new information would be too late. [R. v. Ayr, 14 Can. Cr. Cas. 210; Ex parte Tompkins, 12 Can. Cr. Cas. 552, distinguished.]

Ex parte Stewart (N.S.), 29 Can. Cr. Cas. 301.

"PRIVATE DWELLING-HOUSE" — DWELLING AND SHOP.

A private dwelling, which is part only of a building, another part of which is used as a shop or factory, is not a place where intoxicating liquor may be kept, having regard to the definitions of "private dwelling-house" in the Ontario Temperance Act, 6 Geo. V., ch. 50: see sec. 41 (1) and sec. 2, clause (i) and sub-clause (i). A motion to quash a magistrate's conviction for having liquor on premises other than a private dwelling-house, was dismissed.

Rex v. Purdy, 41 O.L.R. 49.

PLACE OTHER THAN DWELLING-HOUSE—EVIDENCE—FINDING OF MAGISTRATE.

A motion to quash a magistrate's conviction of the defendant for that he, between the 26th October, 1917, and the 10th November, 1917, unlawfully had or kept or gave intoxicating liquor in a place other than the private dwelling-house in which he resided, contrary to sec. 41 of the Ontario Temperance Act, 6 Geo. V., ch. 50, was dismissed, where it was proved that a dozen bottles of whisky were delivered to the defendant on the 30th October, 1917; and, that being the "liquor concerning which he is being prosecuted" (sec. 88), he did not explain what was done with it. Sec. 88 cast upon him the onus of shewing that he was innocent of the offence charged; and neither he nor his witnesses attempted to do this. When the defendant's dwelling-house was searched, no liquor was found. It was not enough for him to say, "I had ten bottles concealed in my house," when he did not say anything about what he might have had elsewhere—he having received two dozen bottles of whisky on the 24th August and two dozen more on the 7th September, 1917. The magistrate was not bound to believe all that was sworn to, and might well have discredited anything the accused did say.

Rex v. Moore, 41 O.L.R. 372, 30 Can. Cr. Cas. 206.

ONTARIO TEMPERANCE ACT — MAGISTRATE'S CONVICTION FOR OFFENCE AGAINST SEC. 41—HAVING INTOXICATING LIQUOR IN PLACE OTHER THAN "PRIVATE DWELLING-HOUSE" — "OCCUPANT"—HUSBAND AND WIFE.

Rex v. Condola, 15 O.W.N. 71.

ONTARIO TEMPERANCE ACT — MAGISTRATE'S CONVICTION FOR OFFENCE AGAINST SEC. 40—HAVING OR KEEPING INTOXICATING LIQUOR ON PREMISES FOR SALE, BARTER, OR OTHER DISPOSAL—EVIDENCE—ENTRIES IN BOOKS OF EXPRESS COMPANY—RECORD OF SALES—LETTER WRITTEN BY LICENSE INSPECTOR— ADMISSIBILITY — ANALYSIS OF NATIVE WINE FOUND ON PREMISES—PURCHASER OF NATIVE WINE —ONUS—SEC. 88 OF ACT—"OTHER DISPOSAL"—AMENDMENT.

Rex v. Nazzareno, 15 O.W.N. 120.

ONTARIO TEMPERANCE ACT—MAGISTRATE'S CONVICTION FOR OFFENCE AGAINST SEC. 40—SELLING INTOXICATING LIQUOR IN HOTEL—EVIDENCE OF DETECTIVES OR SPIES—CORROBORATION UNNECESSARY—APPLICATION OF RULE AS TO ACCOMPLICES—SUFFICIENCY OF EVIDENCE TO WARRANT CONVICTION—APPEAL TO DISTRICT COURT JUDGE—NO NEW EVIDENCE TAKEN — MAGISTRATE'S CONVICTION QUASHED—OPINION OF JUDGE AS TO CREDIBILITY OF DETECTIVES FORMED IN A PREVIOUS CASE—FURTHER APPEAL TO APPELLATE DIVISION—CONVICTION RESTORED—EVIDENCE OF PRIOR CONVICTION—QUESTIONS PUT TO ACCUSED ON CROSS-EXAMINATION—CANADA EVIDENCE ACT, SEC. 12—ONTARIO EVIDENCE ACT, SEC. 19 (1).

Rex v. McCranor, 15 O.W.N. 260.

APPEAL FROM COUNTY COURT—JURISDICTION —"PRIVATE DWELLING-HOUSE"—SUITE OF ROOMS.

The Court of Appeal has jurisdiction to entertain an appeal by an accused from a judgment of a County Court Judge affirming a conviction by a police magistrate for an offence against the British Columbia Prohibition Act, ch. 49, 1916.

Rex v. Sit Quinn (B.C.), [1918] 3 W.W.R. 316.

(§ III G—89)—STATUTORY FORMS OF PROCEEDINGS.

Where a liquor law authorises the use of special forms thereby provided for certain offences and as to others declares that those forms shall form a guide for framing new forms in like manner, the use of the word "liquor" as meaning "intoxicating liquor" will be validated as regards an information, summons and conviction under the Act for an offence as to which a specific form is not provided, if such use of the word is generally, although not universally, made in the statutory forms.

Ex parte Pirie, 29 Can. Cr. Cas. 164, 45 N.B.R. 195.

H. SEIZURE AND DESTRUCTION.

(§ III H—90)—INQUIRY FOR FORFEITURE ORDER.

On an equal division of the Supreme Court of Nova Scotia, a motion for prohibition stood dismissed by which it was sought to prevent a magistrate who had made a summary conviction for keeping liquor for sale in contravention of the Nova Scotia Temperance Act following a plea of guilty of the charge laid in general terms without identification of the liquor, from proceeding with a further hearing and inquiry upon a proceeding in rem under that Act to determine whether the liquor seized or what part thereof should be ordered to be destroyed. [Townsend v. Cox, [1907] A.C. 514, 12 Can. Cr. Cas. 509, and McNeil v. McGillivray, 42 N.S.R. 133, referred to.]

Rex v. Fong Quing and Fong Toy, 39 D.L.R. 60, 51 N.S.R. 503, 29 Can. Cr. Cas. 61.

SEIZURE UNDER WARRANT — REASONABLE TIME—REPLEVIN.

Where intoxicating liquor has been seized under warrant (sec. 46 of ch. 2, N.S. 1910), and brought into court, the magistrate may lawfully detain it for a reasonable time pending proceedings for its condemnation, and no other court has a right to interfere with such possession.

Lavie v. Hill (N.S.), 40 D.L.R. 459, 29 Can. Cr. Cas. 287.

REPLEVIN OF LIQUOR SEIZED—PRIVATE DWELLING-HOUSE.

A replevin order should not be granted against a chief of police for the return of intoxicating liquor in his custody which has been seized in a place other than a private dwelling-house.

Lim Jim v. McRae (B.C.), [1918] 1 W.W.R. 404.

ONTARIO TEMPERANCE ACT—SEIZURE OF INTOXICATING LIQUOR FOUND IN RAILWAY CAR — SHIPMENT UNDER FALSE NAMES FROM QUEBEC TO MANITOBA—SEIZURE AT TOWN IN ONTARIO EN ROUTE —JURISDICTION OF MAGISTRATE FOR TOWN TO ORDER CONFISCATION—SEC. 70 OF ACT—APPLICATION TO QUASH ORDER—STATUS OF APPLICANT—"OWNER" — INTENTION TO VIOLATE ACT—ONUS.

Re Ontario Temperance Act; Renaud's Application, 15 O.W.N. 213.

I. Trial of offenders.

(§ III I—91)—INFORMATION—AMENDMENT —DATE AND INFORMANT.

A conviction under the Liquor Act (Alta.) is not invalidated, by amending the original information before any evidence is taken, by changing the date of the offence, and changing the informant to another constable who swears to the information as amended. [Rex v. Chew Deb, 9 D.L.R. 266, distinguished.]

Rex v. Van Fleet, 41 D.L.R. 65, 13 A.L.R. 320, 30 Can. Cr. Cas. 147, [1918] 2 W.W.R. 432, affirming 38 D.L.R. 592.

MOTION TO QUASH—NOTICE OF MOTION—SUPPLEMENTAL NOTICE—SERVICE—AMENDMENT — EVIDENCE — POSSESSION —PRESUMPTION—SUSPICIOUS CIRCUMSTANCES.

A motion to quash a magistrate's conviction of the defendant for an offence against sec. 41 of the Ontario Temperance Act, 6 Geo. V., ch. 50, was based upon the ground that there was no evidence to support it; but on the return, another objection, not taken in the notice of motion, was raised. Sec. 63 (2) of the Judicature Act provides that "the notice shall specify the objections intended to be raised." The defendant was allowed to serve a supplemental notice, the original motion being retained:—Held, that the supplemental notice was not a new notice of motion; that a notice of motion to quash was served within the 30 days prescribed by sec. 102 (2) of the Ontario Temperance Act (added by sec. 33 of the Ontario Temperance Amendment Act, 1917, 7 Geo. V., ch. 50); and that it was competent for the Judge before whom the original motion came to permit the defendant to amend his notice so as to specify the particular objection, notwithstanding the lapse of 30 days from the date of the conviction. The motion was, therefore, entertained upon both grounds taken. Held, as to the first ground, that, intoxicating liquor having been found in the defendant's possession, sec. 88 of the principal Act compelled the defendant to prove that he did not commit the offence of having or keeping liquor contrary to the provisions of the Act; whether the evidence which the defendant adduced was sufficient to satisfy this onus was a question for the magistrate; and his finding should not be reviewed. Held, upon the second ground, that the conviction was bad as insufficiently describing the offence, but should be amended under sec. 101 of the Act. The evidence of the defendant's possession of liquor was undisputed, and the presumption created by secs. 85 and 88 was not rebutted by the evidence—the circumstances attending the defendant's possession being such as to raise a strong case of suspicion against the plaintiff's statement that, when the liquor was found in his possession, he was transporting it from a place in the Province of Quebec where it might lawfully be purchased to places in Ontario where it might lawfully be kept, viz., his own house and the house of a neighbour.

Rex v. Leduc, 43 O.L.R. 290, 30 Can Cr. Cas. 246.

SUMMARY CONVICTION — AMENDMENT ON APPEAL.

On an appeal from a summary conviction on a charge under the Prohibition Act of unlawfully having intoxicating liquor in a place of public entertainment, held that an amendment should not be allowed so as to make the charge one of having liquor in a place other than a private dwelling house.

Rex v. Chung Chan (B.C.), [1918] 1 W.W.R. 398.

TWO INFORMATIONS FOR SIMILAR OFFENCES—CONVICTION QUASHED.

A conviction for an offence under the Liquor Act quashed because at the time of the hearing the magistrate had before him another information against the accused for a similar offence, and did not dispose thereof before entering upon the hearing of the present case.

Rex ex rel. Brankley v. McManus (Alta.), [1918] 3 W.W.R. 3.

QUEBEC LAW—DELIVERY OF LIQUOR IN PROHIBITION MUNICIPALITY — INFORMATION—CERTIORARI.

If a person is accused of having delivered intoxicating liquor in a municipality where a prohibition by-law is in force, the charge should be based upon such by-law and not upon the Quebec license law. The production, at the enquête, of a copy of such by-law not mentioned in the information, is illegal. In such circumstances, a conviction will be annulled by certiorari. No contestation by writing is permitted to invalidate a writ of certiorari, not even by way of motion to quash. A conviction or order complained of can only be objected to by affidavit if lack of jurisdiction be shewn.

Fraser v. Cour du Recorder, 19 Que. P.R. 5.

J. SECOND AND SUBSEQUENT OFFENCES.

(§ III J—94)—CONVICTION OF MAGISTRATE—EVIDENCE—AMENDMENT.

The Court may amend the conviction, so as to impose only the penalty for a first offence, where there is no evidence to support the finding of the magistrate that the accused had been previously convicted under the Liquor Act.

Rex v. Van Fleet, 41 D.L.R. 65, 13 A.L.R. 320, 30 Can. Cr. Cas. 147, [1918] 2 W.W.R. 432, affirming 38 D.L.R. 592, [1918] 1 W.W.R. 332.

READING WHOLE INFORMATION.

On a charge of a second offence under the N.S. Temperance Act, it is proper for the magistrate at the commencement of trial to read over the whole information to the accused although by sec. 44 he is required to enquire in the first instance concerning the subsequent offence and on a finding of guilt thereof "and not before" enquire concerning the previous conviction. This requirement relates to the trial and examination of witnesses and not to the arraignment. [Faulkner v. The King, [1905] 2 K.B. 76, and R. v. Fox, 10 Cox C.C. 502, distinguished.]

Rex v. Shatford, 38 D.L.R. 366, 51 N.S.R. 322, 28 Can. Cr. Cas. 284.

RECORD—STENOGRAPHIC NOTES.

The stenographic notes of evidence in a summary conviction matter are not necessarily a record of all the proceedings apart from the depositions, and where a conviction for a second offence is in due form it is not to be presumed that there was no adjudication on the later offence before recording the plea to the charge of having been previously

convicted, although no note of the adjudication on the offence then being tried appeared in the stenographic notes other than a reference to the sentence as for a second offence. Even if there were an irregularity in that respect in proceedings under the Ontario Temperance Act, the conviction would not be invalidated thereby as the provisions of the Act in that regard are merely directory and do not go to the jurisdiction. [R. v. McDevitt, 28 Can. Cr. Cas. 352, 39 O.L.R. 138; R. v. Coote, 17 Can. Cr. Cas. 211, 22 O.L.R. 269, referred to.]

Rex v. Hanley, 30 Can. Cr. Cas. 63, 41 O.L.R. 177.

IV. Civil remedies.

A. In general.

(§ IV A—95)—Actions under Liquor Act—Prescription.

The 2 months prescription in art. 1171 of the License Law of Quebec only applies to actions and proceedings brought by the Collector of Revenue of the province, or by a municipal corporation under par. 31 of the Act, and not to those provided for by art. 1091 of R.S.Q. for damages against a hotelkeeper on account of assaults committed by drunken persons to whom he had served intoxicating liquor.

Martin v. New Carlton Hotel, 53 Que. S.C. 380.

Fines and penalties—Action for penalties against company and secretary—Ontario Companies Act, 2 Geo. V., ch. 31, sec. 134—Default in making out and transmitting summaries to provincial secretary—Secretary wilfully permitting default—Finding of fact of trial judge—Penalties—Leave to apply for remission.

Seagram v. Pneuma Tubes Limited, 15 O.W.N. 59, 199.

JOINDER.

See Action; Pleading; Parties.

JOINT TENANTS.

See Co-tenancy.

JUDGES.

See Courts; Trial; Appeal.

Annotation.

Constitutional powers as to creation of Courts and appointments thereon: 37 D.L.R. 183; 24 D.L.R. 22.

JUDGMENT.

I. Rendition; entry; amendment; summary judgment.
- A. In general.
- B. By confession.
- C. Jurisdiction; necessity of service or appearance.
- D. For and against whom; several or joint.
- E. Form and substance.
- F. Entry; record; summary or speedy judgment.
- G. Modification; varying terms of.

II. Effect and conclusiveness: res judicata.
- A. In general.
- B. Decrees interlocutory, by default, direction, or on demurrer; dismissal.
- C. Collateral attack.
- D. What matters concluded.
- E. As to parties.

III. The lien.
- A. In general.
- B. On what property.
- C. Sufficiency of index.

IV. Foreign judgments.
- A. Of foreign country.
- B. Of sister province.

V. Discharge; assignment.

VI. Revival; enforcement.
- A. Enforcement.
- B. Revival; scire facias.

VII. Relief against; rehearing; actions to annul.
- A. In general.
- B. Defences.
- C. Grounds.
- D. Procedure.
- E. Time.
- F. Rehearing.

Annotations.

Foreign judgment, action upon: 9 D.L.R. 788, 14 D.L.R. 43.

Judgment; conclusiveness as to future action; res judicata: 6 D.L.R. 294.

Judgment; enforcement; sequestration: 14 D.L.R. 855.

Judgment as affected by moratorium: 22 D.L.R. 865.

I. Rendition; entry; amendment; summary judgment.

A. In general.

(§ I A—1) — Summary judgment — King's Bench Act.

Summary judgment cannot be ordered under rule 625 of the King's Bench Act, when the statement of claim, in addition to the money demand, asks for other relief such as foreclosure or forfeiture or the setting aside of an alleged fraudulent conveyance.

Campbell v. Morgan (No. 1), 28 Man. L.R. 531, [1918] 2 W.W.R. 810.

Motion for summary judgment under rule 56 — Action on promissory note — Defence — Part failure of consideration — Vague statements in affidavit — Unascertained and indefinite claim — Leave to defend refused — Right of action on cross-claim reserved.

McLaren v. Peuchen, 14 O.W.N. 39.

Defendant not appearing at trial — Judgment for plaintiff on proof of claim — Setting aside — Terms.

Harris v. Garson, 15 O.W.N. 140.

(§ I A—3) — Judgment against vendor — Execution — Immoral sale — Possession.

An action to recover the balance of the

purchase price of property having been successfully defended on the ground that the transaction was immoral and void, but the sale not having been formally set aside, the purchaser being in fact in possession animo domini, a seizure by the sheriff under a judgment against the vendor will be set aside as in contravention of art. 699 of the Code of Civil Procedure.

Vézina v. Lafortune, 41 D.L.R. 208, 56 Can. S.C.R. 246, reversing 25 Que. K.B. 544, which reversed 48 Que. S.C. 254.

(§ I A—5) — Option to purchase — Abandonment — Judgment by confession.

McLeod v. McLeod (B.C.), 40 D.L.R. 741.

D. For and against whom; several or joint.

(§ I D—20)—Joint negligence.

The fact that an action of joint negligence has been brought against two defendants, and one has been proven to be not liable, is no reason why judgment cannot be maintained as against the one remaining.

Evans v. Corp. of Richmond (B.C.), 43 D.L.R. 214, [1918] 3 W.W.R. 487.

F. Entry; record; summary or speedy judgment.

(§ I F—45) — Sufficiency — When binding—Power to amend.

The entry of the judgment by the prothonotary or clerk in open court, either in the docket or on the back of the proceedings, is not the Court's final judgment. Such entry is only a note of the delivery of the judgment and has no authentic character. So long as the judge's signature is not on the draft, that document is nothing but an informal draft of the judgment without any value, because the signature is the essential formality which renders that document authentic and of legal effect. The Court or a Judge has discretionary power to modify the judgment after it has been given, not only in the case provided for in art. 546, but also in the case of error or surprise, so long as it has not been signed and registered; but the judgment thus amended must be given in open court under art. 537. An application to correct or alter a judgment before its signature or registration should be made by motion or petition, supported by a sworn statement, in accordance with rule 47, and not by a mere notice addressed to the opposite party. But as soon as the judgment becomes final by the signature of the judge, and its registration according to art. 544, its revocation or setting aside can be accomplished only by the methods laid down in the code of procedure.

Arthur v. Baillargeon, 19 Que. P.R. 392.

Registration of judgment.

The registration of a judgment is a conservatory step which may be taken by a conditional creditor, notwithstanding that it is subject to appeal.

Desjardins v. Belanger, 19 Que. P.R. 338.

Opposition to judgment—Execution.

A plaintiff who, after obtaining judgment, obtains a writ of execution against the defendant, and interrogates him under art. 590 C.C.P., thereby acquiesces in the judgment, and cannot then desist. A second judgment obtained upon an amended declaration after such desistment can be annulled upon an opposition to judgment.

Charland v. Lamaire, 54 Que. S.C. 156.

Opposition—Reasons—Champerty.

The fact that a defendant thought that the action against him was taken only for champerty and would not be returned into Court, would not, even if proven, be a sufficient reason to have an opposition to judgment received.

Picard v. Nolet, 19 Que. P.R. 24.

Settlement of minutes — Liability of bank and of commissioners appointed by Lieutenant-Governor.

Ottawa Separate School Trustees v. Quebec Bank, 14 O.W.N. 48. [See 13 O.W.N. 369, 15 O.W.N. 88; 41 O.L.R. 594; 35 D.L.R. 134, 39 O.L.R. 118.]

II. Effect and conclusiveness; res judicata.

A. In general.

(§ II A—60) — Cause of action not same.

Where the cause of action is not the same as a former action [County of Wentworth v. Hamilton Radial Electric R. Co., 28 D.L.R. 110, 31 O.L.R. 659, 33 D.L.R. 439, 35 O.L.R. 434, 54 Can. S.C.R. 178] and the same question was not in issue and was not raised or decided, there can be no application of the doctrine of estoppel or res adjudicata.

County of Wentworth v. Hamilton Radial Electric R. Co., 41 D.L.R. 199, 41 O.L.R. 524; 13 O.W.N. 331, affirming 12 O.W.N. 379.

New evidence.

The plaintiffs obtained a judgment against the defendant by default in 1895, for debt. Ten years later the defendant brought action to set aside the judgment on the ground that it was obtained by fraud, which was dismissed. In an action by the plaintiffs for the amount due on the first judgment the grounds for defence were substantially the same as those upon which the action of 1905 was based, but the defendant also claimed that new evidence had been discovered since the action in 1905. The learned trial Judge dismissed the action on the ground of res judicata. Held, on appeal, affirming the decision of Clement, J., that on the question of res judicata the test is whether the issues now sought to be set up were disposed of on the former trial. The discovery of new evidence has no bearing on the case.

Williams v. Richards, 25 B.C.R. 19.

B. Decrees interlocutory, by default, direction, or on demurrer; dismissal.

(§ II B—71) — Dismissal of motion — Power of attorney — Appeal.

A judgment of the Superior Court dis-

missing a motion for the rejection of a power of attorney from a foreign plaintiff is an interlocutory judgment from which an appeal lies under art. 46, C.P. Que.

San Martin Mining Co. of Canada v. Ingeniera Importadora Y. Contratista Co., 43 D.L.R. 322, 27 Que. K.B. 527.

(§ II B—76) — DISMISSAL FOR NON-COMPLIANCE WITH RULE OF SECURITY—STAY OF PROCEEDINGS.

The dismissal of an action for failure to comply with an order for security for costs is not a bar to another action for the same cause, but the Court has an inherent power to stay the second action until the costs of the former have been paid. Where the claims set out in the second action are new, at least in form, and have not been specifically disposed of by the prior judgment, there is no res adjudicata apparent concerning them, but nevertheless the defendants are at liberty to plead res adjudicata.

Smith v. Merchants Bank of Canada, 38 D.L.R. 321, 40 O.L.R. 309.

D. CANCELLATION; REVOCATION; FORFEITURE.

(§ II D—178)—ADMINISTRATOR'S BOND — DEFAULT JUDGMENT — LIQUIDATED DEMAND.

Where a judgment has been obtained for the amount of the plaintiff's claim against an estate, and the Court of Probate, being satisfied that the condition of the administration bond has been broken, has assigned the bond under the provisions of the Probate Act to the plaintiff who thereby became entitled to sue on the bond, and recover thereon as trustee for all parties interested, a default judgment may be entered for the judgment, debt, and interest, the statement of claim being for a liquidated demand under O. 27, rule 2. The sureties on such bond cannot compel the creditor to establish the claim over again against the estate.

McKay v. McKay (N.S.), 41 D.L.R. 390.

III. The lien.

B. ON WHAT PROPERTY.

(§ III B—205)—CHARGING ORDER ON SHARES.

The Imperial Judgments Act (1838), 1 & 2 Vict., ch. 110, and amending Act (1840), 3 & 4 Vict., ch. 82, are in force in Saskatchewan, and under sec. 14 of R.S.S. (1909), ch. 52, the Court adopts English rule 631, which gives a Judge power to make a charging order on shares of the stock of a company for payment of the amount due on a judgment against a shareholder of the company.

Miller Morse Hardware Co. v. Smart, 38 D.L.R. 171, 10 S.L.R. 409.

IV. Foreign judgments.

See Conflict of Laws.

V. Discharge; assignment.

(§ V—250) — RELEASE — JOINT CREDITORS.

The general rule that a release of a debt by one of several joint creditors constitutes a release as against any subsequent claim made by the remaining creditors, will not be adhered to where there are special circumstances which would make its strict application inequitable. Three persons obtained a judgment against two defendants; two of the joint judgment creditors entered into an agreement with one of the judgment debtors under which they took from him a lease of a coal mine on a royalty basis, the third judgment creditor, obtaining on the face of the document, no interest in the lease at all; they also agreed to take from the one judgment debtor a mortgage upon the mine for an amount in excess of the judgment debt and agreed that the royalties to be paid by them should be applied in a certain order in payment, inter alia, of the interest and principal of their own mortgage; and they also agreed that their lease might be forfeited upon notice for non-operation of the mine, though the third joint creditor had apparently no means of intervening to prevent the forfeiture, and they agreed that upon such a forfeiture no further amounts should be payable upon their mortgage. In consequence of this agreement, an appeal by the judgment debtors was discontinued. An action was subsequently brought upon a bond given as security for the judgment in the first action and the defendants relied upon the agreement as a release. Held, that, although there was no allegation, or evidence of intent to defraud, it would be unjust and inequitable to hold the third joint creditor bound by such agreement. [Niemann v. Niemann, 43 Ch. D. 198, 59 L.J. Ch. 290, applied.]

Larose v. Ocean Accident & Guarantee Corp., 13 A.L.R. 187, [1918] 1 W.W.R. 616.

VI. Revival; enforcement.

See also Execution; Levy and Seizure.

As affected by moratorium, see Moratorium.

A. ENFORCEMENT.

(§ VI A—255) — MORTGAGE — REGISTRATION—NOTICE—PRIORITY.

One who has actual notice of a judgment or compensation order cannot gain priority by obtaining a mortgage of the property and having it registered before the judgment or order has reached the registrar.

Kizer v. Morse, 39 D.L.R. 640, 52 N.S.R. 112.

DEMAND FOR IMPRISONMENT — SERVICE OF JUDGMENT — STATEMENT OF COSTS.

A demand for imprisonment must be preceded not only by the service of the judgment, but also of an order to pay and of a notice that the plaintiff will be forced, under penalty of coercive imprisonment, to pay the judgment three months after such notice. A detailed statement of the costs must also be previously served on the defendant.

Beby v. Schafer, 19 Que. P.R. 289.

VII. Relief against; rehearing; actions to annul.

A. In general.

(§ VII A—270) — Petition in revocation—Nature of remedy.

A petition in revocation of judgment is a means of withdrawal and not of revision or construction of the judgment. A judgment, ill founded on the merits and the grounds of the main contestation decided by it, cannot be grounds on which the petition in revocation can be based. French law has never allowed the recourse by a petition in revocation of a judgment, which simply decides a question of law. The mere submitting a case to the decision of the Court on a factum or statement, with the consent of the parties' attorneys, cannot give rise to a petition in revocation of judgment. The King's declaration of April 22, 1732, addressed to the superior council of Quebec, and giving to the parties, by art. IX., the simple remedy by petition, of having an ambiguous judgment construed, has never been repealed, and is still in force.

Michelakis v. Regimbald, 19 Que. P.R. 300. [See 36 D.L.R. 367.]

Petition in revocation—Cancellation.

Contrary to an opposition to judgment, the filing of a petition in revocation of judgment does not cancel the judgment rendered.

Popliger v. Glazer, 19 Que. P.R. 241.

Petition in revocation — Conclusions — Inscription in law.

A petition in revocation of judgment has the effect of putting the parties in the same position they were previous to the judgment. Accordingly the following conclusions taken in this request, namely, "that all the proceedings be declared void and of no value; that the parties, the plaintiff and defendants, be declared out of Court and in the same state in which they were before action brought" should be rejected in an inscription in law.

Duclos v. Dagenais, 54 Que. S.C. 71.

Petition in revocation—Péremption.

A petition in revocation of judgment will be received against a judgment declaring an action périmpted, if such judgment was given by default on a day when the Court sits only for uncontested motions and those in which witnesses should be heard, and after there had been, by consent, several adjournments of the application for péremption.

McGibbon v. G.T.R. Co., 20 Que. P.R. 62.

Revocation — Record — Garnishment — Renunciation.

A creditor, who holds a judgment which he has tried to execute against his debtor's assets, may by way of a petition in revocation, ask the cancellation of a judgment rendered at his debtor's request, and have noted in the record his renunciation of the estate in whose hands he had a writ of garnishment issued. Such a petition, showing primâ facie a good claim, will be received by the Court.

Robert v. Charbonneau, 19 Que. P.R. 237.

Revocation — Action — Prescription — Inscription in law.

A principal action is not, under Quebec law, a way of providing against final judgment. The prescription of 6 months, mentioned in art. 1178, C.C.P., concerning petitions in revocation of judgment, is a good ground for an inscription in law directed against such an action.

Faust v. Avisais, 19 Que. P.R. 109.

Revocation — Third party opposition — Guardian and ward.

It is by a petition in revocation of judgment, and not by a third party's opposition, that a tutor should ask the setting aside of a judgment rendered ex parte against his ward during his predecessor's administration.

McMullin v. Spark, 19 Que. P.R. 442.

Action to annul — Illegal sentence — Penalties — Collector of revenue—License Act.

When there is no way of protecting oneself against a judgment rendered illegally, then the direct action to set aside may be made use of. If the judgment, the nullity of which is sought, is a sentence rendered according to the License Act under art. 1163, R.S.Q., the Court will not consider defects in the merits or in the form unless the plaintiff shews prejudice. One who pays a fine, condemned under penalty of imprisonment, is not considered as having acquiesced in the judgment. An action to recover back penalties illegally paid cannot be directed against a revenue collector.

Riberdy v. Tremblay, 27 Que. K.B. 385.

Opposition to annul — Compensation — Practice — Costs.

A defendant may, on the ground of compensation, make an opposition to annul a seizure, under art. 645, C.C.P., alleging that the judgment which is being executed is extinct, the opposition indicating a claim easily realized, such as an account of a few items for advertisements published in a newspaper, according to a scale of prices stipulated in a written contract. The priority of the claim-offer in compensation of the judgment is not a legal means sufficient to have the seized party's opposition dismissed, because compensation takes place "de jure," according to the principle enacted by art. 1188, C.C. (Que.), from the moment two debts exist together, before it has been declared by the Judge or opposed by the parties. As a matter of principle the Code of Civil Procedure does not recognize the opposition to annul as a means of attacking a final judgment in a contested case. Art. 645, C.C.P., which entitles the seized defendant to allege, by such an opposition, all grounds which might affect the merits of the judgment, is in derogation of the common law and hardly harmonizes or agrees with

the other means of recourse allowed by the Code. However, the provisions of that article are so close and positive that there is no ground for construction, and they must be applied to their full extent, according to art. 12, C.C. (Que.), even if they appear not to agree with the general principles of the Code. They thus include, without any distinction, all the grounds of the seized party provided they have not been raised and decided. Art. 217, C.C.P., is an exception to the common law which requires that any action should start by a writ, in the name of the Sovereign. It may be applied only if the ground of the cross-demand cannot be raised by a plea to the action. Therefore, the defendant is not bound to make a cross-demand to prove the compensation he alleges, if the debt the plaintiff owes him is clear and liquidated or easy to realize, and he may, in such case, allege compensation in his plea to the action. Art. 217, C.C.P., is optional and not imperative, all the other means of recourse are left open to the defendant who has not made use of the cross-demand. The object of the special recourse given by art. 217 to a defendant is to avoid costs. If a defendant, by way of an opposition to annul the seizure, raised a ground of compensation which he might have raised to contest the main action, either by a plea to the merits or by cross-demand, and if such an opposition, being accepted, incurs more costs than such a plea to the merits or cross-demand, the Court, in giving the final judgment, will be justified in setting off the costs.

Wiseman v. Eagle Publishing Co., 19 Que. P.R. 79.

OPPOSITION TO ANNUL — JOINT DEBTORS — SURETY — APPEAL.

In proceedings brought against two joint and several debtors, a contestation of the action brought by one debtor does not benefit his co-debtors notwithstanding a contestation of the justness of the debt by one of them, the creditor has the right to proceed to judgment against the other and to execute such judgment against his goods. In any case, the debtor injured by a judgment given by default against him ought to appeal, by one of the methods of appeal against judgments and not by opposition to the execution of the judgment.

La Compagnie Julien v. Lamy, 53 Que. S.C. 304.

C. GROUNDS.

(§ VII C—282) — ACTION FOR AN ACCOUNTING BETWEEN PARTNERS — DEFAULT JUDGMENT — APPLICATION TO SET ASIDE —GREAT DELAY.

Fieldhouse v. Buxton, 40 D.L.R. 736, 13 A.L.R. 269, [1918] 2 W.W.R. 355.

PETITION IN REVOCATION — ABSENCE OF DEFENDANT.

A defendant, condemned by a judgment of the Superior Court deciding the merits of the case, cannot have the judgment revoked by a petition alleging that his attorney was forced to proceed in his absence by order of the Court; that he has a good plea but that his attorney did not then have in his possession the documents supporting the plea; that those documents were bills of lading which the defendant has succeeded in obtaining only since the judgment had been rendered.

McCall v. Patenaude, 24 Rev. Leg. 394.

(§ VII C—289) — REVOCATION OF JUDGMENT—MISTAKE.

There may be a petition in revocation of judgment, when the judgment was rendered through a misunderstanding between the attorneys of the parties, and it is not proven that another judgment on the merits could not be rendered.

Poitras Woolen Mills v. Feathers, 53 Que. S.C. 509.

JUDICIAL NOTICE.

See Evidence.

JUDICIAL SALE.

See also Execution; Levy and Seizure.

Foreclosure sales, see Mortgage; Vendor and Purchaser.

(§ I A—1)—MALICIOUS PUBLICATION — LIABILITY — DAMAGES.

One who maliciously announces a judicial sale by others than the officer who, by law, is charged with this duty, in other places than that or those prescribed by the code of Civil Procedure, is responsible in damages.

Gélinas v. Gerbeau, 53 Que. S.C. 294.

(§ IV—35)—SHERIFF'S SALE — FALSE BIDDING — RES JUDICATA — SERVICE.

There is res judicata in an opposition made by a purchaser to a resale of an immovable for false bidding when he has already contested the petition for the resale on the same grounds as those alleged in his opposition, except that in the first case, in his conclusions, he only reserved his right to ask the nullity of the sheriff's sale, and in the second one, he asked that nullity. An application to set aside a sheriff's sale must be served on all parties interested.

Trust & Loan Co. v. Courville, 24 Rev. Leg. 489.

JURISDICTION.

See Courts; Appeal.

Review of jurisdiction, see Certiorari.

Of Railway Board, see Railways; Carriers; Railway Board.

In Criminal Cases, see Criminal Law; Summary Convictions; Justice of the Peace.

Admiralty matters, see Admiralty; Shipping; Seamen; Collision.

Of Exchequer Court, see Crown.

JURY.

I. RIGHT TO TRIAL BY.
- A. In general.
- B. When right exists.
- C. Loss or waiver of right.
- D. Denial or infringement of right.

II. Impanelling; selection; competency.
A. In general.
B. Qualification; competency.
C. Examinations.
D. Peremptory challenges.
E. Exclusion; rejection.
III. Number.
IV. Special jury.
V. Verdict; setting aside.

I. Right to trial by.

A. In general.

(§ I A—1)—Order refusing — Appeal.

An order refusing a jury trial is an exercise of discretion, and when it has been based on a proper principle and in pursuance of a reasoned opinion, it should not be reversed on appeal. [Gardner v. Jay, 29 Ch. D. 50; Kent Coal Concessions v. Duguid, [1910] 1 K.B. 904, at p. 910, and [1910] A.C. 452, at p. 453; Jarmain v. Chatterton, 20 Ch. D. 493; Young v. Thomas, [1892] 2 Ch. 134 referred to.] (Per Harvey, C.J.) Stuart and Simmons, JJ., agreed that the appeal should be dismissed; Beck, J., dissenting, referring to the opinion expressed by him in Salter v. Calgary, 27 D.L.R. 584, thought the plaintiff entitled to a jury.

Hogan v. Northern Construction Co., 13 A.L.R. 230, [1918] 1 W.W.R. 652.

Jury notice — Order striking out — Action for injunction and account.

Mining Corporation of Canada v. Irwin, 15 O.W.N. 64.

Motion for.

When the option for a jury trial is made in the declaration, a motion praying such is useless.

Dinardo v. Payette, 19 Que. P.R. 219.

B. When right exists.

(§ I B—10) — New Brunswick rules.

Under the New Brunswick rules of practice, the right is preserved to both parties to a jury for the trial of the issues in any action in the King's Bench Division except in the case covered by order 30, rule 4, where the matter to be determined is likely to require "prolonged examination of documents or accounts or any scientific investigation." The Judge should not, save with the consent of both parties, direct trial without jury except in the case covered by rule 4, but when such order has been made, neither party can obtain a jury by simply giving notice under rule 5 (1) while such order remains in force and unrescinded.

Fairweather v. Foster (N.B.), 42 D.L.R. 723.

C. Loss or waiver of right.

(§ I C—25) — Notice — Payment of fees —Extension of time — Final judgment.

Held, the pronouncement and entry of final judgment in an action terminates all interlocutory motions. A judge in chambers, on an application of the defendant to strike out a jury notice for non-payment into Court, of jury fees within the prescribed time enlarged the time for payment in and dismissed the application. On appeal, held (per Haultain, C.J.S., and Newlands, J.A.) that rule 239, which says that the jury notice shall be void unless the fees are paid into Court within the prescribed time, is to be read with rules 704 and 747, and that failure to pay the jury fees within such prescribed time does not deprive the plaintiff of his right to a jury, but that a judge has power to enlarge the time and make good the proceedings under the two latter rules. Held (per Lamont, J.A., dissenting), that rules 704 and 747 had no application to the payment into Court under rule 239, and that the plaintiff having failed to pay the jury fees into Court within the prescribed time, his jury notice was, under rule 239, void, and there was no power in a Judge to revive it.

Andrews v. Canadian Northern R. Co., 11 S.L.R. 203, [1918] 2 W.W.R. 331, affirming [1918] 1 W.W.R. 460.

Deposit — Forfeiture — Holiday.

If the delay of 30 days to proceed to a trial by jury, mentioned in art. 442, C.C.P., expires on a holiday, it is continued in full force until the next day. 2. When this delay ends on April 9, which falls on Easter Monday, a holiday, a motion to fix the day of trial and to choose the jury, notice served April 10 and presented April 12 is a valid proceeding which interrupts the forfeiture of the right. 3. Default in making the deposit required by art. 434, C.C.P., within the delay allowed by art. 442, is not sufficient to cause the loss of right to a trial by jury.

Montreal Tramways Co. v. Dougan, 27 Que. K.B. 279.

Failure to plead.

A plaintiff who has only delayed his option for a jury trial, in order to permit the defendant to reply to an answer containing new facts has not lost his right to oppose a trial by jury.

Mathys v. Factories Insurance Co., 20 Que. P.R. 287.

Action in warranty.

A plaintiff who, by his declaration, has chosen a jury trial, does not lose that right because the defendant has called in warranty a third party; and, although the action in warranty is not subject to a jury trial, he also obtained the joinder of the action in warranty with the principal action.

Mercier v. Montreal Tramways Co., 19 Que. P.R. 15.

II. Impanelling; selection; competency.

(See previous Annual Digests.)

III. Number.

(See previous Annual Digests.)

IV. Special jury.

(See previous Annual Digests.)

V. Verdict; setting aside.

See Trial; New Trial; Appeal.

JUSTICE OF THE PEACE.

Jurisdiction in criminal matters, see Criminal Law; Summary Convictions; Intoxicating Liquors; Disorderly House; Certiorari; Habeas Corpus.

Annotations.

Order for further detention on quashing conviction: 25 D.L.R. 649.

Constitutional powers as to creation of justice Courts and appointments thereon: 37 D.L.R. 183.

(§ I—4)—APPOINTMENT OF WOMAN.

A woman is under no legal disqualification in the Province of Alberta from being appointed a Justice of the Peace or Police Magistrate.

Rex v. Cyr, 38 D.L.R. 601, 12 A.L.R. 320, 29 Can. Cr. Cas. 77, [1917] 3 W.W.R. 849, affirming 12 A.L.R. 320.

(§ III—10) — JURISDICTION — IMMOVABLE RIGHTS — FENCES.

An action for $31.80, the cost of construction and maintenance of a fence by the plaintiff upon his land, in default of the defendant who had undertaken, in an authentic deed, to put up and maintain such fence, is within the jurisdiction of a district magistrate's Court.

Rose v. La Cour du Magistrat du District d'Ottawa, 24 Rev. Leg. 129.

LABOURERS.

See Master and Servant.

LACHES.

See Estoppel; Limitation of Actions.

LAND CONTRACTS.

See Vendor and Purchaser; Land Titles; Contracts.

LANDLORD AND TENANT.

I. CREATION AND EXISTENCE OF RELATION.
II. LEASES.
  A. In general.
  B. Covenants.
  C. Terms; holding over; renewal.
  D. Termination; forfeiture.
  E. Assignment; sub-letting.
III. RIGHTS AND LIABILITIES OF PARTIES.
  A. In general.
  B. As to fixtures and property on premises.
  C. Liability of landlord for defective or dangerous premises.
  D. As to rent.
  E. Re-entry; recovery of possession.

Annotations.

Forfeiture of lease; waiver: 10 D.L.R. 603.

Lease; covenants for renewal: 3 D.L.R. 12.

Lease; covenant in restriction of use of property: 11 D.L.R. 40.

Municipal regulations and license laws as affecting the tenancy; Quebec Civil Code; 1 D.L.R. 219.

I. Creation and existence of relation.

(§ I—3) — LEASE — REQUISITES — DEFINITENESS OF TERM.

In order to satisfy the Statute of Frauds and create a valid lease there must appear either in express terms or by reference to some writing which would make it certain or by reasonable inference from the language used, on what day the term is to commence and when it is to end. A memorandum which has inserted alternative time for the commencement of the term does not satisfy these conditions and cannot be enforced. [Marshall v. Berridge (1881), 19 Ch. D. 233, referred to.]

Mitchell v. Mortgage Co. of Canada (Sask.), 43 D.L.R. 337, 11 S.L.R. 447, [1918] 3 W.W.R. 838.

II. Leases.

B. COVENANTS.

(§ II B—10) — COVENANT TO INSURE AGAINST MARINE RISK — BREACH — DRY DOCK — IMPOSSIBILITY OF PERFORMANCE.

The lessee of a dry-dock agreed with the lessor to use the dry-dock in the construction of caissons and other similar work and also covenanted to insure the dry-dock for the benefit of the lessor in a sum not less than $75,000 against both marine and fire risks, and to redeliver the dry-dock upon the termination of the lease in as good condition as it was in at the time of its delivery to the lessee, except for the natural wear and tear. The lessee used the dry-dock in connection with the construction of a breakwater and ocean pier but no insurance could be obtained during the course of the work. The dry-dock collapsed and became a total loss, although it had weathered a gale while being taken from Seattle to Esquimalt Harbour where the construction work was being done. Held, per Galliher, J.A., Macdonald, C.J.A., concurring, without deciding whether the risk incurred in the course of the work was a marine risk, that the covenant to insure was in fact one to indemnify, with insurance as a security, and that therefore the lessees were liable, but only for the actual value of the property at the time of its destruction. McPhillips, J.A., held that the loss of the dry-dock was not due to a marine risk, although the inability to place such insurance would not have relieved the lessee from liability if the loss had been one that such insurance would have covered. [Blackburn Bobbin Co. v. Allen, [1918] 1 K.B. 540, referred to on this point] and that the lessees were liable for the value of the dry-dock, owing to their inability to return it in accordance with the terms of the lease. Martin and Eberts, JJ.A., concurred in reducing the amount of the judgment by $40,500.

Seattle Construction and Dry Dock Co. v. Grant Smith & Co. & McDonnell (B.C.), 44 D.L.R. 90, [1918] 3 W.W.R. 703.

PROVISION FOR RENEWAL—INTERPRETATION.

Where a lease provides for a renewal thereof "upon such terms as may be mutu-

ally agreed upon" and also provides that if the renewal be not brought about the lessor will pay the lessee the cost of alterations and additions made to the demised premises by the lessee, the lessor is liable under the latter clause if through his unreasonableness the agreement to renew is not made (per Macdonald, C.J.A.); the lessor is so liable, if the agreement to renew is not made, regardless of the element of reasonableness (per Martin, J.A.). Eberts, J.A., concurred with Macdonald, C.J.A., and Martin, J.A., in dismissing the appeal. [Per McPhillips, J.A., dissenting, applying Loftus v. Roberts (1902), 18 T.L.R. 532.] The stipulated damages are payable only where the agreement to renew has been arrived at and there is a breach thereof by failure to grant the renewal lease. Under a provision in a lease that "all improvements, alterations and fixtures constructed or made in and upon the said premises shall become the absolute property of the lessor" at the end of the term, held, under the circumstances, that the tenant was entitled to remove trade fixtures (per Macdonald, C.J.A., expressly affirming Gregory, J., [1917] 3 W.W.R. 966; Martin and Eberts, JJ.A., also held, without expressly dealing with this point, that the appeal from Gregory, J., should be dismissed.)

P. Burns & Co. v. Godson (B.C.), [1918] 3 W.W.R. 587. [Affirmed by the Supreme Court of Canada.]

CAVEAT EMPTOR — COVENANT FOR QUIET ENJOYMENT.

The principle of caveat emptor applies to a tenant in respect to his landlord's title. [Clayton v. Leech, 41 Ch. D. 103, referred to.] A tenant cannot dispute his landlord's title. In an action for rent evidence intended to show lack of title in the plaintiff was admitted subject to it being dealt with as the Judge saw fit in giving judgment. [Jacker v. International Cable Co., 5 T.L.R. 13, referred to.] A covenant for quiet enjoyment applies only to the acts of the lessor himself and of those who claim through or under him, and to constitute a breach of such a covenant there must be an actual interference with the tenant's possession, a notice demanding possession for non-payment of rent is not sufficient. It is the duty of a tenant to protect and support the title of his landlord [Att'y-Gen'l v. Hotham, Turn. & R. 209, at p. 219].

Woods v. Opsal (B.C.), [1918] 1 W.W.R. 985.

WARRANTY—BUGS.

A tenant is justified to refuse to take possession of a dwelling, if he discovers that it is infested with bugs. Where, at the signing of a deed of lease, the lessor verbally gave the lessee who makes the remark that he had been informed that the house was full of bugs, the assurance that it was not the case, there is a warranty on the part of the lessor justifying the lessee to refuse to enter into the occupation of the house, if he finds out that in fact the dwelling is infested with this vermin.

Foley v. Baker, 24 Rev. Leg. 185.

EXPENSES—TAXES—PAROL EVIDENCE.

The lessee of a shop who in his written lease undertook to pay for his rent "half of all expenses of the said shop for rent, taxes and all other expenses, etc.," must pay half of the land taxes imposed upon real property by the city of Montreal. Parol evidence cannot be admitted to prove such an agreement.

Robert v. Latourelle, 54 Que. S.C. 168.

(§ II B—16) — WARRANTY AS TO FITNESS.

In a demise of real property only, a condition or warranty that it is fit for the purpose for which it is intended to be used will not be implied. [Davey v. Christoff, 28 D.L.R. 447, not followed.]

St. George Mansions v. Hetherington, 41 D.L.R. 614, 42 O.L.R. 10.

COVENANT RUNNING WITH LAND — AGREEMENT TO BUILD — ASSIGNMENT — ASSUMPTION OF LIABILITY.

Notwithstanding the general rule that there is no implied covenant by a lessor of an existing building that it is fit for the purpose for which it was known to be intended to be used, the defendant lessors were held bound by their agreement to erect a building for their lessees and were, under the circumstances of the case, bound to make that building suitable for the purposes for which the lessees required it, and the defendant assignees of the lessors were held to have assumed the liability of remedying the defects complained of in consideration of the tenants' relinquishment of their possible right of rescission. Quære as to the liability of the assignees, had they not assumed such obligation.

Tarrabian v. Ferring (Can.) [1918] 2 W.W.R. 172, affirming 35 D.L.R. 632, 12 A.L.R. 47.

C. TERMS; HOLDING OVER; RENEWAL.

(§ II C—23)—TENANT AT SUFFERANCE.

A lessee who is allowed to occupy the leased premises for a certain time after the lease has been terminated by notice, holds under sufferance, and is properly chargeable with rental on a quantum meruit for use and occupation.

Gardner v. Holmes, 38 D.L.R. 156, 24 B.C.R. 416, [1918] 1 W.W.R. 456.

D. TERMINATION; FORFEITURE.

(§ II D—30)—SHORT FORMS ACT.

A lease made in pursuance of the Short Forms of Leases Act (R.S.O., 1914, ch. 116) cannot be surrendered by parol agreement.

Re Bagshaw and O'Connor, 42 D.L.R. 596, 42 O.L.R. 466.

(§ II D—33) — NON-PAYMENT OF RENT — RIGHT OF RE-ENTRY FORFEITURE.

The right of re-entry for non-payment of rent overdue for 15 days (Short Forms of Leases Act, R.S.O., 1914, ch. 116, sched. B.,

No. 12; Landlord and Tenant Act, R.S.O., 1914, ch. 155, sec. 19) is not defeated by tender or payment of the rent remaining due after the landlord became entitled to the right to forfeit.

Re Bagshaw and O'Connor, 42 D.L.R. 596, 42 O.L.R. 466.

ACTION BY LANDLORD FOR FORFEITURE OF LEASE — BREACH OF COVENANT TO REPAIR — ALTERATION IN PREMISES — NECESSARY REPAIRS — ABSENCE OF COMPLAINT — BREACH OF COVENANT NOT TO ASSIGN OR SUBLET — HOTEL COMPANY — POWER TO CARRY ON BUSINESS AS DEALERS IN RUBBER GOODS — LETTING INTO POSSESSION — NECESSITY FOR SHEWING VALID ASSIGNMENT — CONSENT TO SUBLETTING.

Straus Land Corporation v. International Hotel Windsor, 15 O.W.N. 10, reversed, in part, 15 O.W.N. 411.

CANCELLATION OF LEASE — UNINHABITABLE HOUSE.

(By the Superior Court.) A lessee cannot abandon the house he occupies, and have his lease cancelled, because it has become uninhabitable, without making a formal demand upon his lessor to make the necessary betterments, unless it is a case of urgency.

Saba v. Duchow, 54 Que. S.C. 53.

E. ASSIGNMENT; SUB-LETTING.

(§ II E—35)—ASSIGNMENT TO PROVINCE — ACCEPTANCE — KING'S BENCH ACT.

Under sec. 26 (b) of the King's Bench Act, ch. 46, R.S.M. 1913, a lease to the government of Manitoba, or the rent due thereunder, cannot be assigned so as to make the assignment binding upon the government unless the assignment be accepted in writing by the Provincial Treasurer.

Elliott v. Forrester (Man.), [1918] 2 W.W.R. 220.

SUB-LEASE — ACCEPTANCE — PRESUMPTION — CANCELLATION — PAROL EVIDENCE— —ULTRA PETITA.

If a lessor accepts rent from a sub-tenant, he is presumed to accept the latter as his tenant, unless it appears that he has not abandoned his rights against the principal tenant. Should the lessor, who has allowed the sub-letting, sue the principal lessee with attachment for rent and ask the cancellation of the lease, and obtain judgment in his favour, the sub-tenant occupying the premises with his own furniture has a sufficient interest to oppose that judgment as a third party. An agreement between a lessor and a sub-lessee, to the effect that the rents of July, August and September, amounting each to over $50, and which were payable in advance, should be paid respectively in the course of the month, may be proven by oral evidence with a beginning of evidence in writing in three cheques, one dated July 12 for $125, another dated July 13 for $75, and a third one dated July 25 for $475, given to the lessor on account of the rent of July. A lessor who takes possession of the leased premises and occupies them himself, cannot later sue the lessee for cancellation of the lease and base his action on the rent due for that period of time covering his occupation. When premises are sub-let with the consent of the lessor, even if the latter has reserved his recourse against his principal lessee, an action for the cancellation of the lease cannot be brought by him without bringing the sub-lessee into the case. If the conclusions in an action for attachment for rent asking the cancellation of the lease are taken against the principal lessee only, the sub-lessee who was occupying the premises with the lessor's consent, not having been called in the case, the Court cannot, without deciding "ultra petita" order the expulsion of the sub-lessee.

Duchess Amusement Co. v. Desmarteau, 27 Que. K.B. 541.

ASSIGNMENT—COVENANT.

An assignee of a lease who stipulates that " if the assignee sells the business which he is actually carrying on he shall have the right to transfer his lease," may, after he has made a voluntary abandonment of his property, transfer his lease and his business, with the approval of his creditors, and of freeing the original lessee of all his obligations to the owner. The original lessee has no right to complain of the abandonment to creditors.

Labonte v. Sicotte, 24 Rev. Leg. 250.

III. Rights and liabilities of parties.

A. IN GENERAL.

(§ III A—40) — LIABILITY OF TENANT — DAMAGE FROM FREEZING.

A tenant who brings something to rented premises which is liable to cause damage to the property unless proper precautions are taken, is liable for the resulting damage where such precautions have not been taken.

Conklin v. Dickson, 38 D.L.R. 692, 40 O.L.R. 460.

LEASE OF FARM BY MOTHER TO SON — ACTION FOR BREACHES OF COVENANTS — FAILURE TO PROVE BREACHES — IMPROVEMENTS— FINDINGS OF FACT OF TRIAL JUDGE.

Léonard v. Léonard, 15 O.W.N. 169.

(§ III A—43) — REPAIRS — APPARENT DEFECTS — INJURIES — LIABILITY.

A lessor, who stipulates in a lease that he shall not be bound to make any repairs, even those required by law if they are not mentioned in the lease, is not responsible for damages sustained by the lessee from a fall on a stairway in an outhouse, on which a step was in bad repair, the lease making no mention of repairs to this stairway. Besides, the condition of the step cannot be deemed a hidden defect, and the lessee should not have exposed himself to the danger which he might have foreseen.

Barry v. Quinlan, 24 Rev. Leg. 126.

REPAIRS — COVENANT — ROOF — RAIN PIPES — FORCE MAJEURE — DAMAGES.

An unusual storm, but not an extraordinary one, which can be foreseen and its disastrous effects prevented by ordinary means, is not force majeure or a fortuitous event. The owner of an immovable is responsible for the maintenance of down pipes which conduct rain water. A clause in a lease that "the lessor will not be bound to make any repairs whatsoever, not even the greater repairs which the law requires of lessors," does not apply to a case where repairs are necessary to a roof which shelters several lessees occupying different floors of the house. In an action for damages caused to merchandise, an application by the defendant, in the course of the proceedings, that an examination and valuation of the depreciation be made, should be granted, but if, at such period, the merchandise had changed its condition, the application is properly refused.

Genereux v. Bonnet, 24 Rev. Leg. 319.

REPAIRS — DRAIN PIPE — ROOF — LATENT DEFECTS.

The defects, which a person visiting the premises to be rented cannot ascertain de visu, constitutes a latent defect; and the tenant is not obliged to report it to the proprietor. The tenant is not obliged to repair the pipe which drains the roof of the house he occupies, unless these repairs have been rendered necessary by his fault and negligence.

Vyse Sons & Co. v. Stephens, 24 Rev. Leg. 222.

B. AS TO FIXTURES AND PROPERTY ON PREMISES.

(§ III B—45) — PARTY WALL — DEMOLITION — DAMAGES.

The lessee of a house, whose owner, without any right, has made use of the wall of a neighbouring building as if it was a party wall, has no remedy in damages against his neighbour if the latter demolishes this wall which belongs to him, taking necessary precautions. The remedy of the lessee, in such case, is against his lessor.

Goldberg v. Lavut, 53 Que. S.C. 508.

DRAINS AND SEWERS — DUTY OF TENANT.

When a tenant leaves the rented premises, he should turn off the water and drain the water out of the pipes; if he neglects this precaution, he is liable for the damages that may be caused to the owner through the breaking open of the pipes and the flooding of the house. The tenant is also responsible for the cleaning, if he leaves it in a malodorous condition.

Commercial Properties v. La Compagnie Leduc, 54 Que. S.C. 392.

(§ III B—47) — GROUND LEASE — BUILDINGS OF TENANT — LESSOR TO PAY FOR BUILDINGS AT END OF TERM — FIXTURES OR THINGS — PROVISOS — ARBITRATION.

Re McConkey Arbitration, 43 D.L.R. 732, 42 O.L.R. 380. [See Re Toronto Gen. Trusts Corp. and McConkey, 41 O.L.R. 314.]

(§ III B—49)—INJURY TO CROPS.

One who leases property for a portion of the crop grown has an equitable interest in such crop, and may maintain an action against a third party for damage thereto.

Tennant v. Rhineland, 38 D.L.R. 271, 28 Man. L.R. 302, [1918] 1 W.W.R. 70.

C. LIABILITY OF LANDLORD FOR DEFECTIVE OR DANGEROUS PREMISES.

(§ III C—60) — OFFICE BUILDING — DUTY TO LIGHT STAIRWAYS AND FIRE ESCAPES —INJURY TO CLUB MEMBER.

Even where under the terms of a lease there is an implied obligation on the landlord to keep the staircases in the rented building in repair, he is not also necessarily bound to keep them lighted [per Cayley, C.C.J., applying Huggett v. Miers, [1908] 2 K.B. 278, and distinguishing Miller v. Hancock, [1893] 2 Q.B. 177, affirmed by Macdonald, C.J.A., Martin and Eberts, JJ.A.; McPhillips, J.A., dissenting]. A city by-law providing that "the owner of any theatre . . . office building, or any building requiring fire escapes, shall provide the same with indicating lights at all fire escapes and shall at all times adequately light all lobbies, halls and corridors," held, to be intended to provide protection to tenants and occupants of such building in case of fire, and therefore, not one which could be invoked in an action for personal injuries resulting from falling down an unlighted stairway (per Cayley, C.C.J., affirmed by Macdonald, C.J.A., Martin and Eberts, JJ.A.: McPhillips, J.A., dissenting). The plaintiff was a member of a club which rented the fourth floor of an office building of which the defendant had become the owner under foreclosure proceedings. At 8.30 in the evening the plaintiff left the club rooms and rang for the elevator. It not coming, he walked down the stairway. The stairways and corridors were under control of the defendant, and were at the time lighted only upon the third and fourth floors, so that after leaving the third floor the plaintiff found himself in darkness, and, not knowing that at the mezzanine floor there was a change in the direction of the stairway, fell down the flight of steps leading to the ground floor and was injured. In an action for damages, Cayley, C.C.J., [applying Huggett v. Miers, [1908] 2 K.B. 278,] nonsuited the plaintiff. The plaintiff appealed. Held, per Macdonald, C.J.A., Martin and Eberts, JJ.A.; McPhillips, J.A., dissenting, that the appeal should be dismissed.

McKinley v. Mutual Life Assurance Co. (B.C.), 43 D.L.R. 259, [1918] 3 W.W.R. 1002.

DEFECTIVE ELEVATOR—INJURY.

A landlord is not responsible for injuries resulting from the defective condition of an elevator upon premises in possession of a tenant, even though from time to time he sent his engineer to repair it (per Macdonald,

C.J.A.) and although at the time of the demise, the elevator was out of repair or in a dangerous condition (per McPhillips, J.A.).

Trainshi v. Canadian Pacific R. Co. (B.C.), [1918] 2 W.W.R. 1034. [See [1918] 3 W.W.R. 281.]

WARRANTY — DAMAGES — LESSEES' KNOWLEDGE.

Although a lessor may be liable for damages caused by reason of defects in the thing rented, which prevents or diminishes its use, the lessee has no remedy in damages when the defects are apparent and the lessee knew of them before taking the lease.

Villecourt v. Blais, 53 Que. S.C. 115.

(§ III C—70) — REPAIRS — FLOODING — VIS MAJOR—ACT OF GOD.

To establish the defence of vis major or the Act of God, it is not necessary that the event should never have happened before, it is sufficient that its happening could not have been reasonably expected.

Bénard v. Hingston, 39 D.L.R. 137, 56 Can. S.C.R. 17, affirming 32 D.L.R. 651, 25 Que. K.B. 512.

NEGLIGENCE — LEASE OF PART OF BUILDING —INJURY TO GOODS OF LESSEE FROM BURSTING OF STEAM-PIPES — CAUSE OF BURSTING — DUTY OF LANDLORD — DUTY OF TENANT UNDERTAKING HEATING OF BUILDING — FINDINGS OF FACT OF TRIAL JUDGE.

Hess v. Greenway, 15 O.W.N. 109.

REPAIRS — REMOVAL — DAMAGES.

Where a lessee of business offices sues in damages for injury resulting from improvements to the building, which compelled him to move his offices elsewhere, he cannot include in his damages the money he spent in publishing his new address throughout the province and elsewhere. An amount large enough to publish it locally is sufficient.

Le Credit Canada v. Waterman, 24 Rev. Leg. 406.

D. AS TO RENT.

(§ III D—110) — DISTRESS — PARTITION WALL — ILLEGAL ENTRY.

A landlord who breaks down a partition wall by taking down a case of type and unscrewing a door securely fastened to the wall, and then unhooking a second door, to gain access to the premises, makes an illegal entry and is liable in damages, for wrongful distress for rent.

Douglas v. McKay (N.S.), 40 D.L.R. 314, reversed in 44 D.L.R. 570.

LIABILITY FOR ILLEGAL ATTACHMENT — MALICE — DAMAGES.

There is malice in the act of a lessor who, without previously claiming his rent, proceeds to have the effects of his lessee seized by way of attachment for rent, whilst a suit is pending against the lessee for the cancellation of the lease. A lessee whose effects have been seized in virtue of an illegal attachment for rent is entitled to claim from the seizing party real and vindictive damages.

Bourbeau v. Guillemette, 53 Que. S.C. 194.

SALE OF GOODS — LIABILITY — DAMAGES.

A lessor cannot, because his lessee has abandoned his house, without legal process, enter the leased premises, take away goods which he finds there, and sell them to another. If he does so, he must reimburse the lessee the value of the goods, less the rent due and the damages sustained by him, which he can set-off by virtue of his privilege of lessor, against the goods sold.

Tie Tie v. Desnoyers, 54 Que. S.C. 348.

E. RE-ENTRY; RECOVERY OF POSSESSION.

(§ III E—115) — OVERHOLDING TENANT — MORTGAGOR — REPOSSESSION.

A County Court Judge has no authority under Part III. of the Landlord and Tenants Act, R.S.O. 1914, ch. 155, to make a summary order for the issue of a writ of possession against a mortgagor in possession, at the instance of one whose only claim to possession is as one of several mortgagees.

Re Mitchell and Fraser, 38 D.L.R. 597, 40 O.L.R. 389.

LIABILITY FOR FORCIBLE EJECTMENT.

When a lessee refuses to leave the premises after the expiration of the lease, the lessor has the right to proceed in ejectment according to art. 1624 C.C., but he has no right to take the law in his own hands and forcibly eject the lessee, if he does so he is responsible and may be condemned to pay damages.

Sabbath v. Libercent, 24 Rev. de Jur. 71.

(§ III E—117) — NOTICE TO QUIT—WAIVER.

If a tenant pay money as rent accrued after the expiration of a notice to quit, and the landlord accept it as such, this is conclusive evidence of a waiver of the notice.

Smith v. Smith (N.S.), 40 D.L.R. 509.

LAND TITLES (Torrens System).

I. GENERALLY.
II. REGISTRATION.
III. TRANSFERS; MORTGAGES, LEASES, ETC.
IV. CAUTIONS; CAVEATS AND ADVERSE CLAIMS.
V. LAND CERTIFICATES; TITLES.

Annotations.

(Torrens system); caveat; parties entitled to file caveats; "caveatable interests": 7 D.L.R. 675.

Caveats; priorities acquired by filing: 14 D.L.R. 344.

Mortgages; foreclosing mortgage made under Torrens system; jurisdiction: 14 D. L.R. 301.

Interests of vendors and mortgagees affected by moratorium: 22 D.L.R. 865.

Registration; caveats; notice: 33 D.L.R. 9.

I. Generally.

As affected by moratory Acts, see Moratorium.

Possessory and prescriptive titles, see

Adverse Possession; Easements; Waters.

Patents, claims, see Public Lands; Mines and Minerals.

Nature of estates, see Wills; Deeds.

Sufficiency of title, see Vendor and Purchaser.

(§ I—10) — Lis pendens — Cloud on title —Discretion.

A certificate of lis pendens registered against lands, in an action in which the Crown grant of such land is attacked, creates a cloud upon the title to such land; the registrar of titles properly exercises the judicial discretion conferred on him by the Land Registry Act, R.S.B.C. (1911), ch. 127, sec. 116A (as amended by 4 Geo. V. (1914), ch. 43, sec. 66), in refusing to issue an indefeasible title until such cloud is removed. [Re Land Registry Act and Shaw, 24 D.L.R. 429, followed.]

Re Land Registry Act; Re Granby Consol. Mining & Smelting Co. (B.C.), 41 D.L.R. 335, [1918] 2 W.W.R. 626.

Company — Winding up — Transmission of land.

Re Land Titles Act; Yorkton Gas Co.'s Case (Sask.), [1918] 3 W.W.R. 15.

II. Registration.

See Registry Laws.

(§ II—20) — Crown — Seed grain lien.

The Crown is bound equally with individuals by the provisions of the Land Titles Act (secs. 43 and 44, ch. 24, of 1906, Alberta), and where the necessary proceedings have not been taken to make a seed grain lien effective under the Seed Grain Act (ch. 21 of 1908), a bonâ fide purchaser without actual notice of such lien is protected.

Johansson v. Cronquist, 38 D.L.R. 508, 12 A.L.R. 225.

Caveat for seed grain—Crown lands.

A rural municipality cannot file a caveat against Crown lands for money advanced for seed grain.

Re Land Titles Act (Sask.), [1918] 3 W.W.R. 13.

Titles—Transfer—Trust.

A transfer setting out terms of trust may be registered, although the trusts, except in the case of executors and administrators, must be disregarded by the registrar, and the public generally need not be concerned with them.

Re Land Titles Act and Allan (Alta.), [1918] 1 W.W.R. 440.

Notice of trust — Personal representative — Mortgage — Validity.

Although the Land Titles Act, R.S.S., ch. 41, provides generally that no entry shall be made upon a certificate of title of any notice of trust an exception has been made in the case of land held by a personal representative, and where land is registered in the name of a personal representative as such, the registrar should not register a mortgage thereof made by such reprcsentative in his personal capacity, and the fact that such a mortgage is given registration does not render it valid. Where the representative becomes the beneficial owner of the land the mortgage should be held good as between him and the mortgagee.

Western Trust Co. v. Olson (Sask.), [1918] 3 W.W.R. 811, 11 S.L.R. 418.

Lease — Corporation — Mortgagee in possession — Service of notice — Affidavit of attestation — Sufficiency — Covenant term.

A lease of a special area, such as a basement, ground floor, second floor, may be registered, provided there is a certificate from a Saskatchewan surveyor that the premises are actually part of a lot. Such a lease may not be registered if made by a corporation claiming to be a mortgagee in possession unless proof be given the registrar that the owner and other parties interested have been served with the notice of intention to exercise the power to enter into possession. [Rollefson v. Olson, 21 D.L.R. 671, distinguished.] When the notary public before whom the affidavit of attestation of the witness to a lessee's signature has been sworn has not affixed his notarial seal thereto, the affidavit is defective and useless. A covenant in a lease made by a mortgagee in possession as to the termination of the lease upon the mortgagee's right to possession being determined held not to render the term uncertain or invalidate the lease for registration purposes.

Re Land Titles Act; Re Northern Crown Bank (Sask.), [1918] 1 W.W.R. 421.

Power of attorney — General words as covering discharge of mortgage — Affidavit of attestation not in proper form — Affidavit sworn in the field, France.

Re Land Titles Act; Power of Attorney (Sask.), [1918] 2 W.W.R. 947.

Power of attorney — Revocation of and new power in one instrument— Registration of.

Re Land Titles Act (Sask.), [1918] 3 W.W.R. 139.

Agreement for sale — Cancellation of— Final order for—Registration of.

Re Land Titles Act; Avelsgaard's Case (Sask.), [1918] 2 W.W.R. 946.

III. Transfers; mortgages; leases; etc.

(§ III—30) — Homestead Act — Agreement.

The object of the Act respecting Homesteads (ch. 29, 1915, Sask.) was the protection of the wife's interest in the homestead of her husband. The amendment (sec. 5, ch. 27) of 1916 was to meet the case of a false certificate or affidavit where the Act had been primâ facie complied with. Where the land comprised in an agreement of sale and the vendor at the time of signing the agree-

ment is unmarried the agreement is not invalid because it is not accompanied by the required affidavit. The agreement is valid as between the parties and may be enforced upon completion of the affidavit necessary to enable it to be registered.

Lett v. Gettins (Sask.), 43 D.L.R. 247, 11 S.L.R. 439, [1918] 3 W.W.R. 614, affirming [1918] 2 W.W.R. 881.

TRANSMISSION OF LAND UNDER MARRIAGE CONTRACT — APPLICANT A WIDOW — ADMINISTRATION IN ANOTHER PROVINCE — NECESSITY OF ADMINISTRATION IN SASKATCHEWAN OR RESEALING.

Re the Land Titles Act (Sask.), [1918] 3 W.W.R. 347.

TRANSFER OF LAND UNDER MORTGAGE SALE AND ORDER CONFIRMING — REGISTRATION OF — ORDER PURPORTING TO VEST LAND IN PARTY OTHER THAN TRANSFEREE UNDER THE SHERIFF'S TRANSFER.

Re Land Titles Act; Re Transfer (Sask.), [1918] 2 W.W.R. 951.

MORTGAGE — PARTIAL DISCHARGE — DISCHARGE OF LAND ONLY — REGISTRATION.

Re Land Titles Act (Sask.), [1918] 2 W.W.R. 937.

(§ III—33) — CHARGES — PRIORITY.

Charges under sec. 73 of the Land Registration Act (1911, R.S.B.C., ch. 127) must be given priority according to date of registration not of execution. The section applies to priority between charges under a judgment and under a mortgage.

Bank of Hamilton v. Hartery, 43 D.L.R. 14, [1918] 3 W.W.R. 551, affirming 25 B.C.R. 150. [Affirmed by the Supreme Court of Canada.]

IV. Cautions; caveats and adverse claims.

(§ IV—45) — CAVEAT — MARRIED WOMAN— AFFIDAVIT.

Sec. 85 of the Land Titles Act (Alberta), which requires that all caveats with the exception of a caveat filed by the registrar under sec. 100 must be supported by an affidavit of good faith, applies to a caveat filed by a married woman under the Married Woman's Home Protection Act (Alta. Stats., 1915, ch. 4).

Russell v. Russell, 42 D.L.R. 52, 57 Can. S.C.R. 1, [1918] 2 W.W.R. 672, reversing 12 A.L.R. 111.

CAVEAT — HOMESTEADS — PATENT.

A caveat under an Act respecting homesteads may be filed against Dominion land for which the patent has not yet been issued.

Re Land Titles Act; Graham's Case (Sask.), [1918] 2 W.W.R. 943.

DISCHARGE OF CAVEAT — HOMESTEAD — JURISDICTION OF MASTER.

The Master in Chambers has jurisdiction to order the discharge of a caveat registered in the land titles office under sec. 6 of An Act Respecting Homesteads, ch. 29, 1915.

Re Land Titles Act (Sask.), [1918] 2 W.W.R. 940.

CAVEAT — RESERVATION OF MINES AND MINERALS IN.

Re Land Titles Act (Sask.), [1918] 2 W.W.R. 939.

CAVEAT — RIGHT TO REGISTRATION OF — EXTENT OF DUTY OF REGISTRAR.

Re Land Titles Act; Re Holland Canada Mortgage Co. (Sask.), [1918] 3 W.W.R. 345.

V. Land certificates; titles.

(§ V—50) — "ACTION FOR RECOVERY OF LAND."

An action for the establishment of title only, not claiming possession, is not an "action for the recovery of land" and the certificates of title are not a bar to such action under sec. 104 of the Land Titles Act (Alta.).

Sutherland v. Rur. Mun. of Spruce Grove (Alta.), 43 D.L.R. 280, varying [1918] 3 W.W.R. 152. [See 44 D.L.R. 375.]

TITLE OF TAX-SALE PURCHASER — SERVICE OF NOTICE — HOMESTEAD.

Except in those cases wherein the interest of the person to be served is shewn to be under $200, personal service of notice of an application by a tax-sale purchaser for title should be made in all cases where personal service is possible. The memoranda of liability of a homestead to forfeiture to the Crown in right of the Dominion and of the lien of a colonization society, both of which have been acquired under sec. 44, ch. 54, R.S.C. 1886, must follow on a title granted to a tax-sale purchaser and it is, therefore, immaterial whether notice is given to the Minister of the Interior or to the colonization society of such purchaser's application for title.

Re Land Titles Act (Sask.), [1918] 2 W.W.R. 959.

TAX SALE — RIGHT OF PURCHASER TO APPLY FOR TITLE — RIGHT OF APPLICANT TO ACCEPT SERVICE OF NOTICE FOR REGISTERED OWNER — NECESSITY OF SERVICE OF NOTICE ON PERSONS WITH UNREGISTERED INTERESTS — RIGHT OF SOLICITOR TO APPLY FOR TITLE FOR HOLDER OF TAX-SALE CERTIFICATE — EFFECT OF ISSUE OF CERTIFICATE OF TITLE — RIGHTS OF TAX-SALE PURCHASER.

Re Land Titles Act; Re Arrears of Taxes Act (Sask.), [1918] 1 W.W.R. 364.

TAX SALE — ARREARS OF TAXES ACT, CH. 21, 1915 — APPLICATION FOR TITLE — LAND NOT YET UNDER LAND TITLES ACT — SERVICE ON INTERESTED PARTIES — PROCEDURE TO BE FOLLOWED BY REGISTRAR — LAND TITLES ACT — REFERENCE TO MASTER OF TITLES — NECESSITY.

Re Land Titles Act; Re Arrears of Taxes Act (Sask.), [1918] 1 W.W.R. 414.

COSTS — TAX-SALE APPLICATION FOR TITLE— INSTRUCTIONS — ATTENDANCES — APPLICATION — LETTERS — SETTLEMENT FEE.

Re Land Titles Act; Re Moosomin Land Registration District (Sask.), [1918] 1 W.W.R 416.

ARREARS OF TAXES ACT — CERTIFICATE OF TITLE — CROWN LAND.

The registrar should refuse an application under the Arrears of Taxes Act for a certificate of title to land, the title to which is vested in the Crown.

Re Land Titles Act; Re Lakeside (Sask.), [1918] 1 W.W.R. 461.

TAX SALE DEED — REGISTRATION — NOTICE —JUDGMENT CREDITORS—INSOLVENT.

On an application to register a tax-sale deed, service of notice under sec. 137B of the Land Registry Act, R.S.B.C., 1911, ch. 127, upon judgment creditors is not required where the executrix of the owner has filed a declaration of insolvency.

Re North Vancouver (B.C.), [1918] 1 W.W.R. 626.

ARREARS OF TAXES ACT, 1915, CH. 21—TAX SALE OF LAND OF COMPANY — SHAREHOLDER A VOLUNTEER — RIGHT OF TO PROTECTION AGAINST TRANSMISSION TO TAX-SALE PURCHASER.

Re Land Titles Act; Re Arrears of Taxes Act (Sask.), [1918] 2 W.W.R. 934.

ARREARS OF TAXES ACT, 1915, CH. 21 — REMOVAL OF MEMORANDUM OF TAX SALE — PAYMENT OF TAXES DIRECT TO MUNICIPALITY — COSTS OF TAX-SALE PURCHASER — STATEMENT OF — METHOD OF OBTAINING — SEC. 48.

Re Arrears of Taxes Act (Sask.), [1918] 2 W.W.R. 935.

ARREARS OF TAXES ACT, CH. 21, 1915, SEC. 47 — APPLICATION FOR TITLE — SUBSTITUTIONAL SERVICE — LAND TITLES ACT, SEC. 156.

Re Land Titles Act; Re Arrears of Taxes Act (Sask.), [1918] 2 W.W.R. 938.

ARREARS OF TAXES ACT, CH. 21, 1915, SEC. 48 — APPLICATION FOR TITLE — PAYMENT OF INTEREST — DATE FROM WHICH INTEREST RUNS.

Re Land Titles Act; Re Arrears of Taxes Act (Sask.), [1918] 2 W.W.R. 942.

ARREARS OF TAXES ACT, CH. 21, 1915 — STATEMENT UNDER SEC. 45 — REGISTRATION OF — LACK OF STATEMENT UNDER SEC. 32.

Re Land Titles Act; Re Arrears of Taxes Act (Sask.), [1918] 2 W.W.R. 944.

ARREARS OF TAXES ACT, CH. 21, 1915 — APPLICATION FOR TRANSMISSION BY ASSIGNEE OF TAX-SALE PURCHASER — RIGHT OF CAVEATOR TO STAY PROCEEDINGS.

Re Land Titles Act; Dickenson's Case (Sask.), [1918] 2 W.W.R. 948.

ARREARS OF TAXES ACT, CH. 21, 1915, SEC. 22 — NOTICE OF REDEMPTION — REGISTRATION OF WITHOUT CHARGE.

Re Land Titles Act; Re Arrears of Taxes Act (Sask.), [1918] 2 W.W.R. 949.

ARREARS OF TAXES ACT — SALE — APPLICATION BY PURCHASER FOR TITLE — DEATH OF REGISTERED OWNER — PROOF OF DEATH — DIRECTIONS FOR SUBSTITUTIONAL SERVICE.

Re Land Titles Act (Sask.), [1918] 3 W.W.R. 143.

TAX SALE — PURCHASER THE REGISTERED OWNER — REMOVAL FROM TITLE OF MEMORANDUM OF TAX SALE — WAYS OF CLEARING TITLE.

Re Land Titles Act (Sask.), [1918] 3 W.W.R. 346.

LARCENY.

See Theft.

LEASE.

See Landlord and Tenant; Mines and Minerals.

Annotation.

Covenants for renewal: 3 D.L.R. 12.

LEGACY.

See Wills; Executors and Administrators.

(§ I—1) — DEVOLUTION OF ESTATES ACT — PERSONALTY INSUFFICIENT — LIABILITY OF REALTY.

By the Devolution of Estates Act (R.S.S. 1909, ch. 43, sec. 21) land in Saskatchewan shall descend to the personal representative and be distributed as if it were personal estate; if the personal estate is insufficient to pay legacies for which no fund is provided these must be paid out of the undisposed of real property.

Re Stewart Estate, 42 D.L.R. 512, 11 S.L.R. 332, [1918] 2 W.W.R. 1090.

LEGAL TENDER.

See Tender; Payment.

LEGISLATURE.

Legislative powers, see Constitutional Law.

LETTERS PATENT.

See Companies.

Patents of land, see Public Lands; Mines and Minerals.

LEVY AND SEIZURE.

I. WHAT PROPERTY SUBJECT.
   A. In general.
   B. Property in custody of law.
II. MODE AND SUFFICIENCY; RETURN.
III. RIGHTS AND LIABILITIES GROWING OUT OF LEVY.
   A. Of officer levying.
   B. Of others.
   C. Priorities.

See also Execution; Attachment; Garnishment.

Distress, see Landlord and Tenant; Mortgage; Chattel Mortgage; Bills of Sale; Taxes.

I. What property subject.

(§ I—1) — SEIZURE AND SALE OF IMMOVABLE.

A debtor condemned, in an action in declaration of hypothec, to abandon the property, who does not do so and thus becomes a personal debtor, cannot oppose the seizure of the property by the creditor on the ground that the latter has not previously discussed his movable effects. Such creditor is exempted from doing so by art. 614 C.C.P. (Que.). (Per Martineau, J.): In all cases where the seizure has not to be made at the defendant's domicile or in his presence, no demand of payment is required. At any rate, if such a formality were necessary, its omission could justify the nullity of the seizure only if the seized party suffered prejudice therefrom, and provided he tenders and deposits the amount claimed in the writ of execution.

Brien v. Robert, 54 Que. S.C. 309.

II. Mode and sufficiency; return.

(§ II—30) — SEIZURE BY SHERIFF — SALE — OPPOSITION.

A sheriff seizing movable and immovable effects of a defendant may proceed and sell the immovables if the sale of the movables is stopped by an opposition to withdraw. A debtor who files an opposition to annul against the seizure of his property advertised for sale by the sheriff, asking the latter to proceed with the previous seizure and sale of certain movables which he indicates, cannot later file another opposition to annul against the seizure and sale of those movables on the ground that the seizure of the immovables was still pending, and that the movables indicated by him could not be seized by the sheriff in virtue of the same writ. Such an opposition may be struck out on motion as frivolous.

Gauthier v. de Sambor, 53 Que. S.C. 511.

OWNERSHIP—CONDITIONAL SALE.

A defendant cannot make an opposition to a seizure of movables, on the ground that he is not the proprietor of them, but that they belong to the plaintiff himself, who seized his own property. A stipulation in a sale of movables that the buyer is "not to receive title to said property until the full amount (price of sale) has been paid" is a condition in favour of the plaintiff, and for his protection, which can be waived by the latter, and is not one which can be invoked by the buyer on his behalf.

Maxwell v. Keith, 54 Que. S.C. 120.

REVENDICATION — GUARDIAN — POSSESSION — ORDER OF COURT — RULE NISI.

A voluntary guardian of goods under seizure who is ordered, by judgment of the Court, to deliver these effects to one of the parties, is without interest to contest the rule nisi issued against him on the ground of irregularity and illegality, if he does not contest the order of the Court addressed to him or the sufficiency of the security ordered to be given by the party entitled to the possession of the goods.

Genzer v. Alliance Films Co., 54 Que. S.C. 32.

OPPOSITION AFIN DE DISTRAIRE—TITLE.

Where in an opposition afin de distraire to a seizure of movables, the opposant declares that he bought the goods at a bailiff's sale, the opposition, even if the opposant's title is defective, should not be rejected on motion, but only upon a contestation after issues joined between the parties.

Canadian Consolidated Rubber Co. v. Seidman & Schacter, 24 Rev. Leg. 104.

III. Rights and liabilities growing out of levy.

(§ III A—40) — FI. FA. — COSTS OF EXECUTION.

A sheriff seizing goods under a writ of fieri facias is only entitled to costs of the execution until such time as he receives notice of an assignment for the benefit of creditors. [Creditors' Trust Deeds Act (R.S.B.C. 1911, ch. 13), considered.]

Baker v. Richards (B.C.), 40 D.L.R. 351, [1918] 2 W.W.R. 902.

SALE OF LOGS UNDER EXECUTION—QUANTITY —LIABILITY OF SHERIFF — ESTOPPEL — NEGLIGENCE—DAMAGES.

Held, in agreeing with the opinion of Clute, J., that the failure to give the notice of a sheriff's sale under a fi. fa., as required by rule 557, or a defect in the notice, does not invalidate the sale to an innocent purchaser. Review of the authorities. And held, that the defendant P. was an innocent purchaser; also, that there was no fraud, and no ground upon which the defendant P. could be held answerable in damages to any party to this action; that, in the special circumstances, and having regard to the conduct of the plaintiffs, that the defendant C., the sheriff, was not liable either to the execution debtors, the original plaintiffs, or to the execution creditors, the added plaintiffs. But the sheriff was not entitled to recover his costs of the action from the plaintiffs, because of the loose manner in which his duties were performed. Per Hodgins, J.A.:—The sheriff was not guilty of negligence such as had produced damage to any party suing—actual damage must be proved. Per Riddell and Rose, JJ. (dissenting):—It was the duty of the sheriff to both creditors and debtors to make all that he could out of the goods seized under his writ; the statement of the debtors that there was nothing to seize could not save the sheriff, for he did seize; no conduct by way of estoppel was proved; and the sheriff was liable to the plaintiffs for the damages they had sustained from his omission to perform his duty in the premises.

Maple Leaf Lumber Co. v. Caldbick and Pierce, 40 O.L.R. 512, reversing 34 D.L.R. 766, 39 O.L.R. 201.

BAILIFF — PUBLIC OFFICER — NOTICE.

A bailiff, who receives an opposition to withdraw at the sale of certain movable effects seized by him and who ignores it and proceeds to the judicial sale of those effects, is liable for damages to the owner of the effects. A bailiff is not a public officer and has no right to a notice of action, according to sec. 88 of the Code of Civil Procedure.

Hart v. Rochon, 53 Que. S.C. 253.

C. PRIORITIES.

(§ III C—50) — SEIZURE OF CONTRABAND — CUSTOMS — DEPOSITARY — RIGHTS AND REMEDIES.

When a customs collector seizes goods used for contraband, and deposits them in the hands of a person to whom he entrusts them, their owner has no right to seize them by attachment in revendication, so long as the first seizure is pending. The depositary may, in defence to the owner's attachment in revendication, plead the fact of the deposit, and allege that the collector's seizure was made legally, without alleging an exception of another's right; and an inscription in-law asking to strike out the allegations of the plea referring thereto will be dismissed.

Girard v. Godin, 54 Que. S.C. 263.

LIBEL AND SLANDER.

I. WHO LIABLE.
II. WHAT ACTIONABLE.
  A. In general.
  B. Charging lewdness, bad character, crime, etc.
  C. Damaging business; social standing.
  D. Words about officials or candidates.
  E. Privileged communications.
  F. What constitutes a publication.
  G. Slander of title.
III. ACTIONS; DEFENCES.
  A. In general.
  B. Who may recover.
  C. Defences; justification.

Annotations.

Examination for discovery in defamation cases: 2 D.L.R. 563.

Repetition; lack of investigation as affecting malice and privilege: 9 D.L.R. 73.

Repetition of slanderous statements; acts of plaintiff inducing defendant's statement; interview for purpose of procuring evidence of slander; publication and privilege: 4 D.L.R. 572.

Separate and alternative rights of action; repetition of slander: 1 D.L.R. 533.

Church matters when privileged or libellous: 21 D.L.R. 71.

I. Who liable.

(§ I—1) — NEWSPAPER — PROPRIETOR AND PUBLISHER.

A publishing company which is both proprietor and publisher of a newspaper, substantially complies with sec. 15 of the Libel and Slander Act (1913 Alta., ch. 12, 2nd sess.) by inserting a notice at the head of the editorials: "The . . . . published at . . . by the . . . publishing company."

Scown v. Herald Publishing Co., 40 D.L.R. 373, 56 Can. S.C.R. 305, [1918] 2 W.W.R. 118, affirming 38 D.L.R. 43, 12 A.L.R. 127.

COMPENSATION OF INJURY.

When two persons are injured and the injuries are their mutual acts, there is compensation of injury, and neither has any recourse at law. There is thus compensation of injury if one party accuses the other of being a "perjurer," a "bandit" and a "dishonourable man," and the other replies that the first party is a "prostitute."

Vousounara v. Kautsoginapoulos, 53 Que. S.C. 383.

II. What actionable.

A. IN GENERAL.

(§ II A—10) — NEWSPAPER — CORRUPTION —POLITICAL INFLUENCE.

To charge a newspaper with selling its influence to any political party and therefore binding itself in a manner to deceive the public, by publishing what may be contrary to the honest convictions of its management, tends to bring such newspaper into contempt with the public and result in damages and is therefore actionable.

Albertan Publishing Co. v. Munns, 41 D.L.R. 422, 13 A.L.R. 533, [1918] 2 W.W.R. 761.

WRITING CAPABLE OF BEING LIBELLOUS — QUESTION FOR JURY — INNUENDO — REJECTION OF EVIDENCE AT TRIAL — NEW TRIAL.

Leonard v. Wharton, 15 O.W.N. 197.

QUESTION WHETHER WORDS USED WERE DEFAMATORY — QUESTION FOR JURY — JUDGE'S CHARGE — WORDS CAPABLE OF DEFAMATORY MEANING — GENERAL VERDICT FOR DEFENDANTS — LIBEL AND SLANDER ACT, SEC. 5 — VERDICT NOT PERVERSE.

Wilson v. London Free Press Printing Co., 15 O.W.N. 101.

ABUSIVE LANGUAGE — MEETING OF SCHOOL COMMISSIONERS.

Where, in a meeting of school commissioners to deliberate upon the question of improvement of a school house, one of them, in the heat of discussion, addressing the chairman, said to him, "You have no heart or honour to let the children suffer," but without intention of attacking the chairman's character, a confession of judgment by such commissioner for $20 as reparation should be accepted.

Dufresne v. Belly, 53 Que. S.C. 335.

AFFRONT TO A RACE.

There is no individual right of action for affronts directed to persons collectively, when the individual persons, as in the case of a race, are so numerous that the defamation cannot injure any one in particular, or cause a personal wrong to any one.

Germain v. Ryan, 53 Que. S.C. 563.

B. Charging lewdness, bad character, crime, etc.

(§ II B—15) — Unchastity — Nominal damage.

In an action for slander imputing unchastity to a young girl, only nominal damages can be recovered where no special damage has been proved (Libel and Slander Act, R.S.O. 1914, ch. 71, sec. 19 (1)). Special damage from repetition of the slander for which the defendant is not responsible is too remote. [Review of authorities.]

Stewart v. Sterling, 42 D.L.R. 728, 42 O.L.R. 477.

C. Damaging business; social standing.

(§ II C—25)—Physician.

To say of a physician that he aggravates diseases to make money, and to say "are you not afraid of having your throat cut by Dr. G——, when you allow yourself to be operated on by him," constitutes slander.

Gagnon v. Cusson, 24 Rev. Leg. 233.

D. Words about officials or candidates.

(§ II D—46) — When uttered by clergyman.

A parish priest who solicits a ratepayer not to vote for a certain person because he, as parish priest, knows things about such ratepayer which he is unable to divulge, meaning that he is not a man of integrity or good moral character, and not worthy to hold a responsible public position, is guilty of slander, and liable in damages.

Daly v. Rev. Chenier, 39 D.L.R. 326, 24 Rev. Leg. 114.

E. Privileged communications.

(§ II E—77)—When testifying.

No action will lie for an alleged slander uttered by a witness while giving evidence before a commissioner appointed by the Lieutenant-Governor-in-Council under ch. 2 of 1908 (Alta.).

Georgeson v. Moodie, 38 D.L.R. 105, 12 A.L.R. 358.

(§ II E—80) — Fair comment — Charging corruption.

No action for libel will lie against a newspaper which makes fair and reasonable comments upon prevalent evil conditions, provided they do not exceed the bounds of legitimate criticism, and do not impute personal knowledge and corrupt intention.

Bulletin Co. v. Sheppard, 39 D.L.R. 339, 55 Can. S.C.R. 454, [1917] 3 W.W.R. 279, reversing 27 D.L.R. 562.

III. Actions; defences.

A. In general.

(§ III A—95) — Trial — Misdirection — Admissibility of evidence — Damages — Excessiveness.

Telegram Printing Co. v. Knott, 39 D.L.R. 762, 55 Can. S.C.R. 631, [1917] 3 W.W.R. 335, affirming 32 D.L.R. 409, 27 Man. L.R. 336.

Discovery — Newspaper — Disclosure of contributors.

In a libel action against a newspaper which assumes full responsibility for what it publishes, the Court should not, except under special circumstances, compel it to disclose the name of its contributors or informants.

De Schelking v. Cromie (B.C.), [1918] 3 W.W.R. 1038.

Security for costs — Libel and Slander Act, sec. 12 (1) (2) — Attributing to plaintiff intention to commit suicide — 'Involves a criminal charge" — Jurisdiction of Master in Chambers —Rule 208.

Stone v. World Newspaper Co., 15 O.W.N. 108.

Slander—Special damage.

The fact that as a result of the words complained of people have avoided the plaintiff, is not special damage as will support an action for slander where the words are not in themselves actionable. [Weldon v. DeBathe, 14 Q.B.D. 339, applied.]

Ball v. Donnelly (Sask.), [1918] 3 W.W.R. 55.

Slander — Action for, tried without jury — No actual damage sustained — Small sum assessed as damages — Lump sum allowed for costs.

Garrison v. Eastwood, 15 O.W.N. 273.

Jury trial — Verdict for plaintiff "without damages" — Libel and Slander Act, R.S.O. 1914, ch. 71, sec. 5.

De Luca v. Hare, 13 O.W.N. 450.

(§ III A—99) — Notice.

The notice required to be given under the Libel and Slander Act R.S.O. 1914, ch. 71, sec. 8 (1), in an action for libel contained in a newspaper, must be given to the defendant, and not to the editor.

Dingle v. World Newspaper Co., 43 D.L.R. 463, 43 O.L.R. 218, 14 O.W.N. 251, affirming 14 O.W.N. 200, reversed. 57 Can. S.C.R. 573.

Newspaper — Publication — Failure to give notice before action — Libel and Slander Act, R.S.O. 1914, ch 71, sec. 8 — "Defendant" — Editor — Publisher—Release.

Redmond v. Stacey, 14 O.W.N. 73.

Newspaper — Notice before action addressed to company, publisher of newspaper, by incorrect name — Effect of misnomer — Amendment — Verdict—Costs.

Pohlman v. Times Printing Co., 15 O.W.N. 215.

C. Defences; justification.

(§ III C—105) — Justification — Particulars—Affidavit.

Where the defendant, in an action for

slander, pleads justification, he must state in his plea, or in particulars delivered to supplement the plea, the facts upon which he relies for justification; and, until such particulars are given, the defendant is not entitled to examine the plaintiff for discovery. The plaintiff is not bound to make affidavit of denial before he call upon the defendant for particulars. [Zierenberg v. Labouchere, [1893] 2 Q.B. 183; Arnold & Butler v. Bottomley, [1908] 2 K.B. 151, followed.] Where an order was made requiring the defendant to deliver particulars of a plea of justification, and the particulars delivered did not comply with that order, an order was made setting aside the particulars delivered, with liberty to the defendant to deliver new particulars, verified by his oath that they "are to the best of his belief true and as full and accurate as he can make them, in view of the knowledge he now has."

Henneforth v. Maloof, 42 O.L.R. 36.

NEWSPAPER — PLEADING — STATEMENT OF DEFENCE — SERIES OF LETTERS FROM CORRESPONDENTS — PROVOCATION.

Allan v. Record Printing Co., 15 O.W.N. 134.

LICENSE.

See Municipal Corporations; Companies; Intoxicating Liquors; Automobiles.

Annotation.

Municipal license to carry on a business; powers of cancellation: 9 D.L.R. 411.

LIEN NOTES.

See Bills and Notes; Sale.

LIENS.

Of mechanic or materialman, see Mechanics' Liens.

Vendor's lien, see Vendor and Purchaser; Sale.

Judgment-lien, see Judgment; Execution; Land Titles.

Maritime lien, see Admiralty; Seamen.

Annotation.

Lien for labour; for materials; of contractors; of sub-contractors: 9 D.L.R. 105.

(§ I—3)—OF STABLE-KEEPER.

The Stable Keepers' Act, R.S.M. (1913), ch. 183, does not entitle the keeper to a lien on an animal put in the stable without the knowledge and consent of the owner. [Buxton v. Baughan, 6 Car. & P. 674, followed.]

Yeo v. Farragher, 39 D.L.R. 324, 28 Man. L.R. 424, [1918] 1 W.W.R. 624.

WOODCUTTER'S LIEN — SUB-CONTRACTOR — NOTICE — PERSONAL LIABILITY.

A woodcutter who worked for a sub-contractor and who, not having been paid his wages, gave the owner of the wood the notice required by art. 1994c C.C. (Que.), acquires a privilege on the wood of the latter, but does not thereby obtain any personal recourse against him.

Laurentides Paper Co. v. Rompré, 27 Que. K.B. 194.

SEIZURE OF WOOD AFLOAT — RIGHTS OF OTHERS.

The privilege, created by art. 1994,c C.C. (Que.), in favour of wood cutters, can only be exercised under the conditions determined by law. The fact that the wood seized under the exercise of this privilege was, during the process of the suit, carried away by the breaking up of the ice, and mixed with other wood belonging to a third person who had paid for it, does give ground for personal recourse against the latter.

Rheault v. Brown Corporation, 53 Que. S.C. 296.

WOOD ADRIFT — SALVAGE — RIGHT OF RETENTION — PLEADING.

One who saves lumber floating astray on a river has a right of lien on such lumber for his costs of saving. A creditor who has a right of retention, and who is sued by the owner revendicating the object thus retained, must not ask by his plea the dismissal of the action, but must conclude that he should not be dispossessed without having been reimbursed his costs.

Gagne v. Daigle, 54 Que. S.C. 239.

LIFE INSURANCE.

See Insurance.

LIFE TENANTS.

Creation of life tenancy, see Wills; Deeds.

Annotation.

Estates for life: 31 D.L.R. 390.

LIMITATION OF ACTIONS.

I. LIMITATION IN GENERAL.
- A. In general; statutes.
- B. Equitable remedy; laches.
- C. Bar of prior or other claim, or of portion of claim or defence.
- D. By and against whom available.
- E. To what claims applicable.

II. WHEN STATUTE RUNS.
- A. In general.
- B. Contracts; mortgages.
- C. Corporations, officers and stockholders.
- D. Trusts; bailment.
- E. Fraud.
- F. Torts; negligence; injuries to person or property; crimes.
- G. Suits relating to real property.
- H. Municipal indebtedness or liabilities.
- I. Taxes, assessments and tax sales.
- J. Decedent's estate; executors and administrators.
- K. Judgment.
- L. Absence from province.
- M. Coverture, infancy or other disability.

III. When action is barred.
A. Penalty; statutory liability.
B. Contracts; contribution.
C. Corporations; officers and stockholders.
D. Trusts.
E. Fraud.
F. Torts; negligence.
G. Suits relating to real property.
H Taxes.
I. Judgment.
J. Miscellaneous.
IV. Interruption of statute; removal of bar.
A. In general.
B. By suit.
C. By payment or promise.

Annotation.

Limitations as to actions for redemptions of mortgage: 36 D.L.R. 15.

I. Limitation in general.

Prescriptive and possessory rights, see Adverse Possession; Easements.

II. When statute runs.

F. Torts; negligence; injuries to person or property; crimes.

(§ II F—60) — Action against Crown — Interruption of prescription.

By virtue of sec. 33 of the Exchequer Court Act (R.S.C. 1906, ch. 140) the provincial laws relating to prescription and limitation of actions apply to an action for personal injuries against the Crown in right of the Dominion. Mere "negotiations" do not operate as an interruption of the prescription.

Fradette v. The King, 40 D.L.R. 699, 17 Can. Ex. 137.

G. Suits relating to real property.

(§ II G—65) — Interest in land — Mortgage — Estoppel — Adverse possession — Evidence — Family arrangement — Visits to property — Findings of Master — Appeal.

Re Shields, 14 O.W.N. 205.

H. Municipal indebtedness.

(§ II H—70) — Prescriptions — Montreal charter.

Art. 2267, C.C. (Que.), which denies an action and states that the debt is absolutely extinguished in cases of prescription under arts. 2250, 2260, 2261, 2262, C.C. (Que.), cover equally special prescription and particularly those found in arts. 536a and 537 of the charter of the city of Montreal.

McAvoy v. La Cite de Montreal, 24 Rev. Leg. 314.

III. When action is barred.

B. Contracts.

(§ III B—112)—Mortgage.

Although the remedy is barred by the Statute of Limitations, a debt consisting of the principal and interest due upon a mortgage, remains, and may be retained by the administrator as against any claim made by the debtor against the estate.

Noecker v. Noecker, 41 D.L.R. 138, 41 O.L.R. 296.

F. Torts; negligence.

(§ III F—130) — Action for flooding land — Railway Act.

Held, per Fitzpatrick, C.J., Davies and Anglin, JJ.; Idington, J., and Brodeur, J., contra, that, because of sec. 198 of the Railway Act, ch. 8, 1907 (Alta.), the plaintiff's right of recovery was limited to damages sustained within one year before the action was begun.

McCord v. Alberta and Great Waterways R. Co. (Can.), [1918] 3 W.W.R. 622, reversing 41 D.L.R. 722, 13 A.L.R. 476,

G. Suits relating to real property.

(§ III G—135)—Rent.

The rent of a house is prescribed in five years under art. 2250, C.C. (Que.).

Labrecque v. Boulette, 24 Rev. Leg. 447.

Annulment of deed—Mistake.

A negatory action, founded upon the nullity of a deed on account of mistake, is prescribed in ten years.

Riopelle v. Papineau, 54 Que. S.C. 451.

IV. Interruption of statute; removal of bar.

C. By payment or promise.

(§ IV C—166) — Mortgage — Payments of interest by heirs of mortgagor.

The plaintiff sued upon a mortgage made in 1888, payable 5 years after its date, with interest at 7 per cent. The mortgagor died in 1904, leaving him surviving his widow and three children, the defendants, who continued to live upon the mortgaged land. From time to time, payments on account of interest upon the mortgage were made by one of the children, the last payment being made in June, 1915. The widow defended the suit, alleging that she was not party or privy to the making of the payments on account of interest, and that she had now acquired a possessory title to the mortgaged land:—Held, that the defence was not maintainable: the case was governed by sec. 24 of the Limitations Act, R.S.O. 1914, ch. 75; and sec. 13 had no application. The payment of interest by one of those claiming under the mortgagor was a sufficient payment to keep the mortgage alive as against all persons claiming under him. [Roddam v. Morley (1857), 37 Ch. D. 651, followed.]

McKay v. Hutchings, 41 O.L.R. 46.

Note—Payment of dividend by assignee for creditors.

The payment of a dividend by the curator in a judicial abandonment of property, upon a debt having for consideration notes payable to order, interrupts the five year prescription, as payment made by the curator is as though made by the insolvent himself

In such case prescription begins to run, not from the date when the dividend was payable, but from that of the payments.

Laporte-Martin v. Bouthiller, 53 Que. S.C. 471.

LIMITATION OF LIABILITY.

See Carriers; Shipping.

LIQUIDATED DAMAGES.

See Damages, III; Contracts.

LIQUIDATION.

See Companies, VI; Banks, V; Partnership, VI; Assignment for Creditors.

LIQUIDATOR.

See Companies.

LIQUOR LAWS.

See Intoxicating Liquors.

LIS PENDENS.

See Land Titles.

LIS PENDENS—INSCRIPTION IN LAW.

If on the very face of a declaration it appears that the plaintiff has already brought an action upon the same grounds, but it is not alleged that such action was followed by a final judgment, it is an exception of lis pendens and not an inscription in law which is open to the defendant.

Chaput v. Legault, 20 Que. P.R. 286.

LITIGIOUS RIGHTS.

WHAT CONSTITUTE — ASSETS OF INSOLVENT COMPANY—RIGHT OF WAY.

A sale of the assets of a company being wound-up, even if such assets include claims of which the amount is undetermined, does not constitute a sale of litigious rights. In order that a right may be considered litigious, the contestation to which it is subject must bear on the very existence of that right, and not on its value.

Village de Ste. Thècle v. Matte, 27 Que. K.B. 185.

LITTORIAL RIGHTS.

See Waters.

LOCAL IMPROVEMENTS.

See Municipal Corporations; Highways; Taxes.

LOCAL OPTION.

See Intoxicating Liquors.

LODGES.

See Benevolent Societies; Insurance.

LOGS AND LOGGING.

Lien for services, see Liens.

LORD CAMPBELL'S ACT.

See Death.

LOST GRANT.

See Easements; Adverse Possession; Waters.

LOTTERY.

See Gaming.

Annotation.

Lottery offence under the Criminal Code: 25 D.L.R. 401.

(§ II—5)—FREE OPTION CERTIFICATES.

It is not a lottery offence under sub-sec. (a) of Cr. Code, sec. 236, to publish a scheme for the drawing, without payment or obligation to pay, of certificates giving a privilege of purchase of a class of article at a fixed price alleged to be lower than the value, where no sales of such article are made except to those who draw certificates and they are under no obligation to purchase.

Rex v. Robinson, 41 D.L.R. 46, 29 Can. Cr. Cas. 153, 10 S.L.R. 448, [1918] 1 W.W.R. 258.

LUNATICS.

See Insane Persons.

MAGISTRATE.

See Justice of the Peace; Summary Conviction; Certiorari; Criminal Law.

(§ I—5)—JURISDICTION—DOMINION POLICE COMMISSIONER.

Although sitting within his territorial jurisdiction a magistrate cannot try an offence which is alleged to have been committed beyond his territorial jurisdiction, except where there is a statutory extension of his power in that respect; sec. 577 of the Criminal Code has not been made applicable to offences under Alberta statutes. A Commissioner of Police appointed by the Governor-in-Council under R.S.C. 1906, ch. 92, has no jurisdiction to make a conviction under a provincial law; his jurisdiction is restricted to the matters set forth in the Federal Act and coming within the legislative jurisdiction of the Parliament of Canada.

Rex v. Coyne (Alta.), 41 D.L.R. 225, 29 Can. Cr. Cas. 216, affirming 28 Can. Cr. Cas. 428.

MALICIOUS PROSECUTION.

I. IN GENERAL.

II. PROBABLE CAUSE; MALICE.

Annotations.

Malicious prosecution; principles of reasonable and probable cause in English and French law compared: 1 D.L.R. 56.

Malicious prosecution; questions of law and fact; preliminary questions as to probable cause: 14 D.L.R. 817.

I. In general.

See also False Imprisonment; Arrest.

(§ I—3)—ATTACHMENT — SAISIE-ARRET BEFORE JUDGMENT.

A transaction, without reserve, does not only extinguish the actual damages claimed, but also future ones for the same reason. So, where the plaintiff desists from an attachment before judgment with the consent

of the defendant and without any reserve, this latter cannot afterward claim damages from the plaintiff for malicious prosecution. Where the plaintiff, in an attachment before judgment, falsely alleges the insolvency of the defendant, and persists in this allegation, even after he had desisted from his seizure, he may be, in a cross demand, condemned in damages.

Burtner Coal Co. v. Gano Moore Co. and Canadian Pacific R. Co., 24 Rev. Leg. 435.

II. Probable cause; malice.

(§ II—5)—ARREST—CONSTABLE ACTING IN GOOD FAITH.

An action for damages for malicious arrest and prosecution will not lie against a city where the constable making the arrest acted in good faith, and with probable cause, although the case when called was dismissed for want of proof.

Del Solo v. City of Montreal, 43 D.L.R. 96, 54 Que. S.C. 159.

(§ II—10)—ARREST—WARRANT.

Where the trial judge, sitting without a jury, has found on undisputed evidence that an offence for which the plaintiff might have been arrested without a warrant has been committed, and that the defendants honestly believed that such an offence had been committed, and that it had been committed by the plaintiff, he is justified in drawing the inference that there were reasonable and probable grounds for the arrest and granting the protection of sec. 30 of the Criminal Code.

Anderson v. Johnson, 43 D.L.R. 183, 11 S.L.R. 478, [1918] 3 W.W.R. 620, affirming 38 D.L.R. 563, 29 Can. Cr. Cas 24, 10 S.L.R. 352.

CONSULTING WITH POLICE.

In an action for damages for malicious prosecution it is not a good defence that the only part taken in the prosecution by the defendant was the laying of the information, and the fact that the defendant acted on the advice of a constable or police sergeant, or the combined advice of both, is not conclusive evidence or reasonable or probable cause.

Schaal v. Reeves (Sask.), [1918] 2 W.W.R. 442.

ADVICE OF COUNSEL—INQUIRIES—MALICE—CIVIL RIGHT.

Where in an action for malicious prosecution the defendant sets up the defence that he consulted a solicitor before instituting the criminal proceedings, the soundness of the solicitor's advice is, generally speaking, not weighed, and such defence is a complete answer to the allegation that the defendant had acted without reasonable or probable cause unless the question remains whether through the neglect of the defendant, and subsequently of his solicitor, to make proper inquiries, such defence is not destroyed. The instituting of criminal proceedings for the purpose of establishing a civil right amounts to the malice which must be proven in an action for malicious prosecution.

Ibbotson v. Berkley (B.C.), [1918] 3 W.W.R. 1018.

ADVICE OF COUNSEL—CHARGE OF FALSE PRETENCES—MALICE.

The fact that a defendant to an action for malicious prosecution acted upon the advice of counsel in instituting the prosecution is not necessarily a complete answer to the allegation of lack of reasonable and probable cause. [Harris v. Hickey, 17 B.C.R. 21, 2 D.L.R. 356, followed.] A person seeking to shelter himself behind his counsel must take proper care to inform himself of all the facts. In an action for malicious prosecution, proof that the defendant endeavored to use the criminal courts as a means for collecting a debt establishes such malice as the law requires the plaintiff to prove.

Olds v. Paris (B.C.), [1918] 2 W.W.R. 682.

MALICE — INFERENCE—INQUIRY — HONEST BELIEF IN GUILT.

While absence of reasonable and probable cause is some evidence from which the malice necessary to support an action for malicious prosecution may be inferred, yet the two conditions are distinct and different; malice is entirely a state of mind, the absence of reasonable and probable cause is at least partly an extraneous condition arising by reason of the non-existence of certain facts. The making of an inquiry as to the guilt of the accused is to be considered in determining whether reasonable cause existed, but it is not a state of mind. [Cox v. English, Scottish and Australian Bank, [1905] A.C. 168; Abrath v. N.E.R. Co. (1883), 11 Q.B.D. 440; Brown v. Hawkes [1891] 2 Q.B. 718; Watson v. Smith, 15 T.L.R. 473 cited]. If a person who honestly believes in the guilt of another, and desires only the enforcement of the law, lays a charge against him without making any inquiry whatever as to the accused's guilt, he is not liable in an action for malicious prosecution, even though the result of inquiries would have shown his mistake.

Scott v. Harris (Alta.), [1918] 3 W.W.R. 1028.

ARREST OF TENANT BY LANDLORD—REMOVAL OF GOODS.

When a tenant fraudulently removes his goods subject to the privilege of his landlord, without giving him notice and unknown to him, the latter, after having exhausted his civil remedy and taken the opinion of a magistrate, has probable cause for having him arrested under the Criminal Code, and is not liable in damages if the tenant is subsequently set at liberty.

Rousseau v. Dubois, 54 Que. S.C. 1.

MANDAMUS.

I. When may issue.
A. In general.
B. To Court or Judge.
C. To provincial or federal officers.
D. To county, town or municipal officers.
E. To corporations.
F. Concerning elections; to determine title to office.
G. To school officers.
H. To excise officers.
II. Procedure; hearing; determination.
A. In general; prerequisites.
B. Parties.
C. Pleading; writ and return.
D. Hearing and determination; defences.

I. When may issue.

A. In general.

(§I A—1)—Right to remedy.

In order to entitle himself to a mandamus an applicant must first shew that he has a legal specific right to ask for the interference of the Court.

Clegg v. Macdonald (Man.), 39 D.L.R. 130.

(§I A—4) — To compel license — Other remedy.

A writ of mandamus will not be granted where there is an alternative remedy that is equally convenient, beneficial or effective, nor will a mandamus lie when the issue of the writ would be ineffectual. [Re Charleson Assessment, 21 B.C.R. 281, 22 D.L.R. 240, followed.] The 1917 amendment to sub-sec. (130a) of sec. 125 of the Vancouver Incorporation Act expressly empowers the city to discriminate between holders of vehicle licences.

Re McKay and City of Vancouver, 24 B.C.R. 298.

B. To court or judge.

(§ I B—5)—To enforce judgment—Coercive imprisonment.

There is no ground for a mandamus to force the circuit court, or one of its judges, to order the execution of an order of coercive imprisonment. Coercive imprisonment can be executed only 15 days after the service of the judgment ordering same.

Shapiro v. Roy, 19 Que. P.R. 55.

D. To county, town or municipal officers.

(§ I D—28)—To compel mayor's signature—Contract.

The mayor of a city cannot be compelled by mandamus to sign, in the name of the council, a contract whose exact wording has not been submitted for the approval of the council.

National Cartage & Supply Co. v. Belleau, 54 Que. S.C. 15.

II. Procedure; hearing; determination.

(See previous Annual Digests.)

MANDATORY (Quebec law).

See Principal and Agent; Brokers; Trusts.

MANSLAUGHTER.

See Homicide.

MARINE INSURANCE.

See Insurance.
Marine Risk, see Landlord and Tenant, II. B.

MARITIME LIENS.

See Seamen; Shipping; Admiralty.

MARKETS.

Market values, see Damages; Expropriation.

As affecting carriers' rates, see Carriers; Railway Board.

Annotation.

Private markets; municipal control: 1 D.L.R. 219.

MARRIAGE.

Separation and alimony, see Divorce and Separation.

Custody and support of children, see Infants; Parent and Child; Divorce and Separation.

Marriage contracts and settlements, see Husband and Wife.

Annotations.

Foreign common law marriage; validity: 3 D.L.R. 247.

Enemy alienage as effecting status of married women: 23 D.L.R. 375, 380.

Void and voidable marriages, jurisdiction to annul: 30 D.L.R. 14.

Validity of foreign divorce; domicile: 33 D.L.R. 146, 156.

Enemy alien affecting status: 23 D.L.R. 375, 380.

(§ III—20)—Deceased brother's wife—Death—Action.

Marriage between a man and his deceased brother's wife is not permitted; and although the different churches and religious communities have retained the right they were enjoying at the time of the coming into force of the Civil Code, of granting dispensation from impediments to marriage, under art. 127, C.C., they cannot grant such dispensation in the cases prohibited by art. 125, C.C. However, a marriage, which is null according to the terms of art. 125, may have civil effects if contracted in good faith by all the parties thereto. A widow who marries her deceased husband's brother has a right of action for the death, by accident, of her second husband.

Denault v. United Tps. of Mansfield and Pontefract, 54 Que. S.C. 499.

(§VI A—45)—ANNULMENT OF—FINAL DECREE—FORM.

Walker v. Walker (Man), [1918] 2 W.W.R. 233.

MARRIED WOMEN.

See Husband and Wife.

Annotation.

Enemy alienage as affecting status of married women: 23 D.L.R. 375, 380.

MASTER.

See Courts.

Annotation.

Constitutional law; appointment of Judges; Masters; powers of province as to appointment: 24 D.L.R. 18, 23.

MASTER AND SERVANT.

I. RIGHTS AND RELATIONS GENERALLY.
- A. In general; authority to employ servant or physician.
- B. When relation exists.
- C. Compensation; wages.
- D. Hours of labour.
- E. Termination of relation; discharge; enticing.

II. LIABILITY OF MASTER TO SERVANT.
- A. Nature and extent; master's duty.
- B. Servant's assumption of risks.
- C. Contributory negligence of servant.
- D. Disobedience of rules.
- E. Fellow-servants and their negligence.

III. LIABILITY OF MASTER TO STRANGERS FOR ACTS OF SERVANT OR INDEPENDENT CONTRACTOR.
- A. For acts of servant or agent.
- B. For acts of independent contractor.

IV. LIABILITY OF SERVANTS.

V. WORKMEN'S COMPENSATION; PROCEDURE.

Employer's liability insurance, see Insurance, VIII.

Maritime employment, see Seamen.

Liability of Crown, see Crown.

Annotations.

Assumption of risks; superintendence: 11 D.L.R. 106.

Employer's liability for breach of statutory duty; assumption of risk: 5 D.L.R. 328.

Justifiable dismissal; right of wages (a) earned and overdue; (b) earned, but not payable: 8 D.L.R. 382.

Workmen's compensation; Quebec law; 9 Edw. VII. (Que.), ch. 66; R.S.Q. 1909, secs. 7321-7347: 7 D.L.R. 5.

Fraud of agent or employee; estoppel by conduct: 21 D.L.R. 13.

Rights of alien enemies to recover for injuries arising out of employment: 23 D.L.R. 375, 381.

Master's liability under penal laws for servant's acts or defaults: 31 D.L.R. 233.

I. Rights and relations generally.

C. COMPENSATION; WAGES.

(§ I C—10)—MISCONDUCT—RIGHT TO SALARY.

Misconduct on the part of an employee does not disentitle him to previously earned salary.

Canada Bonded Attorney v. Leonard-Parmiter, 42 D.L.R. 342, 42 O.L.R. 141, 13 O.W.N. 437, varying 12 O.W.N. 388.

CHANGE OF SALARY—EFFECT—DISMISSAL.

Where, during the employment, the salary of the employee is changed from a fixed salary of $125 per month with a commission of 10% to a sole commission of 20%, the contract of hire itself is not affected and remains in force. The employer is bound to pay to his employee the agreed salary, whether he is satisfied or not with his services, as long as he does not choose to put an end to the contract if he has reasons to do it.

Ritchie v. Spence, 24 Rev. Leg. 297.

(§ I C—13)—SAILORS—SALVORS—WAGES.

If a ship is driven on the coast and becomes a wreck and the sailors escape to the land, and successfully act as salvors so as to save enough to pay their wages, they are entitled to them, though not to salvage.

Young v. the Ship "Minnie A." (Ex.), 40 D.L.R. 408.

E. TERMINATION OF RELATION; DISCHARGE; ENTICING.

(§ I E—21)—REFUSAL TO WORK—DISCHARGE—VILE NAMES—CONDONATION.

Refusal on the part of a servant to perform the duties for which he was hired gives the master the right to dismiss him, but does not justify the master in insulting him by calling him vile names. The servant does not necessarily condone the offence because he does not leave the employ immediately, especially if the offence is again committed after a few days, after which the servant does leave the employ.

Berg v. Cowie (Sask.), 40 D.L.R. 250.

(§ I E—22)—MUNICIPAL EMPLOYEE—GROUND FOR DISMISSAL.

The refusal of a municipal employee to discontinue living in apparent open adultery when threatened with dismissal if he continued is sufficient to justify such dismissal.

McPherson v. City of Toronto, 43 D.L.R. 604, 43 O.L.R. 326.

TERM—IMPLIED RENEWAL—MUNICIPAL EMPLOYEE.

The engagement by a municipal corporation for the term of a year, of a civil engineer charged with the superintendance of public works, is a contract of hire of services, susceptible of continuing by tacit renewal. In order that there may be a tacit renewal, it is not sufficient that the employee continue his services after the term ended, but the services so continued

must be with the tacit consent of the employer.

Lessard v. La Cite de Levis, 54 Que. S.C. 139.

TERM OF EMPLOYMENT — DISMISSAL — SALARY—DAMAGES.

By-laws adopted by a joint stock company, which order that the annual meeting of shareholders shall take place the first of February for the election of directors, and that the manager shall be chosen from among the directors, at their first meeting, establish that the engagement of the manager is by the year. A dismissed employee has not the right to sue for his future salary; he can only claim what is due. He ought, under the circumstances, to bring his action in the form of an action for damages, which are usually the amount of the salary which he should have received, less what he has earned or might earn.

Malherbe v. Orkin, 54 Que. S.C. 274.

WRONGFUL DISMISSAL—REMEDY—WAGES—DAMAGES.

An employee dismissed before the termination of his engagement, without sufficient reason, has not only a right of action, but also a right to sue for wages due. It is for the employer to prove the wages or damages of the employee.

Marchand v. Jean, 54 Que. S.C. 279, 24 Rev. de Jur. 492.

II. Liability of master to servant.

A. NATURE AND EXTENT; MASTER'S DUTY.

(§ II A—43)—RAILWAY—INJURY TO EMPLOYEE — NOTICE — NEGLIGENCE — DAMAGES.

McDonald v. Grand Trunk R. Co. and City of Montreal, 40 D.L.R. 749, 53 Que. S.C. 460, affirmed in 44 D.L.R. 189, 57 Can. S.C.R. 268.

(§ II A—48) — DYNAMITE—EXPLOSION—CAUSE OF ACCIDENT—EVIDENCE—PRESUMPTION.

If an accident happens to a workman occupied in filling a mine, by the premature explosion of dynamite, and that the cause of the accident cannot be discovered, there is a presumption of fault against the employer, owner of the dynamite and tools employed by the workman. Such presumption can be combatted if the employer discovers a cause for the accident not chargeable to his own fault, and which would have been able to cause the explosion. In this case it is incumbent on the workman to prove the real cause, and to connect it with an act of negligence of the employer.

Angelo v. Brennan, 53 Que. S.C. 262.

(§ II A—60)—SAFETY AS TO PLACE AND APPLIANCES—RISK OF EMPLOYMENT—NEGLIGENCE OF SERVANT—LIABILITY.

Where an employer does not provide a window-cleaner at his service, with any protective appliance; and where the window-cleaner does not ask for any, they are both guilty of a common fault and must bear equally the damages suffered therefor by the employee.

Johansen v. Windsor Hotel Co., 42 D.L.R. 756, 24 Rev. Leg. 440, 24 Rev. de Jur. 424.

(§ II A—67) — ASSUMPTION OF RISK — HORSES.

A servant assumes the usual and ordinary risks of his work and a master is not liable for injuries to such servant caused by horses with which he was working taking fright, if the horses are ordinary work horses and there is no evidence that the master knew them to be vicious or given to running away.

Williams v. Keeler (Man.), 41 D.L.R. 69.

(§ II A—85)—RAILWAY TRACK—ACCUMULATION OF ICE.

It is the duty of the employer to provide safe premises for his servants to work; allowing ice and snow to accumulate along the side of a railway track so as to be a trap for a workman walking along the track in the performance of his duty is negligence, and if the cause of an accident the company is liable. The fact that the accident happened on a highway is no defence, the duty being founded not on ownership but on possession.

McEntee v. G.T.P. R. Co., 40 D.L.R. 322, 11 S.L.R. 145, [1918] 2 W.W.R. 253.

(§ II A—110) — NEGLIGENCE — DEFECTIVE SYSTEM—TIMBER—INSPECTION.

Canadian Collieries v. Dixon, 39 D.L.R. 758, 55 Can. S.C.R. 620, affirming 36 D.L.R. 388, 24 B.C.R. 34.

B. SERVANT'S ASSUMPTION OF RISKS.

(§ II B—135) — RAILWAY APPLIANCES—DEFECT—FINDING OF JURY — NEW TRIAL.

A railway company is not obliged to have the best appliances for the purpose of discharging freight if the appliances used are reasonably fit for the purpose. If the jury give no finding from which it can be inferred what the defect was which led to the accident, a new trial will be ordered.

Wamboldt v. Halifax & South Western R. Co. (N.S.), 40 D.L.R. 517.

C. CONTRIBUTORY NEGLIGENCE OF SERVANT.

(§ II C—185) — CIRCULAR SAW-GUARD — CONTRIBUTORY NEGLIGENCE.

St. Lawrence Flour Mills Co. v. Stewart, 39 D.L.R. 760, 55 Can. S.C.R. 624, affirming 26 Que. K.B. 476.

DANGEROUS METHOD WHEN SAFER COURSE AVAILABLE.

A workman who, with full knowledge of the risk he is taking, deliberately adopts a dangerous method of doing his work, when there is open to him another method of doing it which is free from risk, cannot impose liability upon his employer for personal injuries resulting entirely from his adoption of the unsafe course.

Powell v. Thomas, Jamieson & Mackenzie (Alta.), [1918] 3 W.W.R. 901.

DEATH OF SERVANT — ELECTRIC SHOCK — WORKMAN EMPLOYED IN REPAIRING ELECTRIC MOTORS — REGULATIONS OF EMPLOYERS — EVIDENCE — NEGLIGENCE OF EMPLOYERS—ACTION UNDER WORKMEN'S COMPENSATION FOR INJURIES ACT, R.S.O. 1914, CH. 146, AND AT COMMON LAW — NEGLIGENCE OF DECEASED—DISMISSAL OF ACTION—JURY.

O'Neil v. Grand Trunk R. Co., 14 O.W.N. 47.

III. Liability of master to strangers for acts of servant or independent contractor.

(§ III—294) — EMERGENCY— DANGEROUS COURSES—SCOPE OF EMPLOYMENT.

If in the case of emergency an employee in the course of his employment has two courses open to him, either of which may be dangerous, and in the emergency adopts the more dangerous and is injured, this does not put him outside the scope of his employment, and he is entitled to damages under the Workmen's Compensation Act (Sask.).

Cameron v. Canadian Pacific R. Co., 42 D.L.R. 445, 11 S.L.R. 277, [1918] 2 W.W.R. 1025.

IV. Liability of servants.

(See previous Annual Digests.)

V. Workmen's compensation; procedure.

(§ V — 340)—BOARD — JURISDICTION — FINALITY OF DECISION.

Where the Workmen's Compensation Board has jurisdiction over any matter brought before it, its action or decision is final and not subject to question or review in any court. If, however, the Board attempts to deal with a matter over which it has not acquired jurisdiction, or if it fails to be governed by the provisions of the Act according to their true intent and meaning, its actions, decisions or proceedings are not protected by s. 57 of the Workmen's Compensation Act, and a party affected may seek the remedies available to him in the courts. An enquiry held by the Board as to the compensation to be allowed the representatives of a deceased workman, is a judicial one, and the employer should be given notice of the time and place of such enquiry. Failure to give such notice is not a ground for setting aside the order, if the Board has jurisdiction to deal with the matter.

Canadian Northern R. Co. v. Wilson (Man.), 43 D.L.R. 412, [1918] 3 W.W.R. 730.

CONTRACTOR—CITY CORPORATION—JURISDICTION OF COURT TO INQUIRE INTO PROCEEDINGS OF BOARD—THIRD PARTY.

The plaintiff, a contractor, sued the defendants, a city corporation, for a sum said to be due under a contract for work done for the defendants. The defendants admitted that they had withheld the amount sued for from the amount justly due to the plaintiff, and had paid it to the Workmen's Compensation Board, upon notification from the Board that the plaintiff was indebted to the Board, under the provisions of the Workmen's Compensation Act, 4 Geo. V. ch 25, and amending Acts (5 Geo. V. ch. 24, 6 Geo. V. ch. 31, and 7 Geo. V. ch. 34), in the sum so withheld, which had been assessed by the Board upon the plaintiff as an employer of wage-earners. The defendants pleaded the order of the Board and its decision that they were entitled to indemnity from the plaintiff:—Held, that the Court had jurisdiction to inquire into the proceedings of the Board so as to ascertain whether or not the defendants had brought themselves within the protection of the Act; that the Act requires that there shall be a decision of the Board; and that in this case, so far as evidence taken at the trial shewed, there was no such decision. There was no evidence that the Board made an assessment or gave notice of an assessment being made, or became entitled to register an assessment, or had registered an assessment; and the defendants were not, so far as the evidence shewed, called upon by any official act of the Board to pay the amount alleged to have been assessed against the plaintiff. Consideration of the provisions of the Act (as amended), especially secs. 10, 60, 62, 63. Judgment was pronounced in favor of the plaintiff for the amount claimed without costs; but the entry of the judgment was stayed for a month to enable the parties to ascertain and adjust the differences between them and the Board. Upon the application of the defendants to the trial Judge, the case was reopened, and the defendants adduced further evidence, upon which it was held, by the trial Judge, upon the question whether a valid assessment had been made, that, although there was no official record of an assessment having been made, what was done by the Board amounted to a valid assessment under the provisions of the Act. The Board in fact never acted or assumed to act under sec. 78, sub-sec. (3), which is its only authority for making an assessment based on such sum as, in the opinion of the board, is the probable amount of the pay-roll of the employer. The Board could not be said to have made the assessment; it was made by an officer of the Board. Secs. 84 to 98 of the Act (as amended) considered. The Board could not delegate its authority to fix the amount upon which the assessment should be based. But, although the assessment made by the officer on the amount of the pay-roll as fixed by him was not binding on the plaintiff, yet, the question having been opened by the Board at the plaintiff's request, and the Board having confirmed what the officer

had done, there was an act of the Board which cured the defect and rendered the assessment valid. The action was, therefore, dismissed. An application by the defendants, made after the original trial and judgment, to extend the time for service of a third party, notice upon the Board was refused, both because it could not be entertained at that stage, and because the Board could not be brought before the Court to answer a claim for anything done under the statute.

Murphy v. City of Toronto, 41 O.L.R. 156, affirmed in 43 O.L.R. 29.

COURSE OF EMPLOYMENT—"ON, IN OR ABOUT"—FACTORY.

A stable in which machinery is installed for cutting and crushing grain for horses is a factory within the meaning of sec. 2 of the Workmen's Compensation Act, Saskatchewan (1910-11, ch. 9). An employee who is injured a quarter of a mile away from such factory while engaged in employment which is not part of the factory work, is not employed on or about such factory at the time of the injury. [Cornea v. National Paving and Construction Co., 26 D.L.R. 402, followed.]

Garrett v. City of Moose Jaw, 42 D.L.R. 621, 11 S.L.R. 307, [1918] 2 W.W.R. 1058.

MACHINERY—FIRE HALLS—FACTORY.

An apparatus for changing an alternating electric current into a direct current, and an instrument for recording fire alarms, are not "machinery used" within the meaning of the Workmen's Compensation Act (Sask.), and they, installed in a fire hall, and fire engines kept therein, do not constitute the fire hall a "factory" within the meaning of that Act.

Hook v. City of Prince Albert, 40 D.L.R. 1, 11 S.L.R. 85, [1918] 1 W.W.R. 922.

ACCIDENT IN COURSE OF EMPLOYMENT—EARNINGS—DEPENDENTS.

A boy was earning $5 per week operating a freight elevator in the defendant's departmental store when he met with a fatal accident by falling down the well of the elevator shaft. The boy lived with his parents and paid his wages into the common fund. The cost of maintenance of the boy, including clothing, did not amount to as much as the boy's wages received by his parents. Held, that the father was a dependent of the deceased within the meaning of the Workmen's Compensation Act (ch. 9, 1910-11). The district court judge found on the evidence that the boy had moved the elevator to the fourth floor of the defendant's building, had then gone down to the third floor on his own business, and while on the third floor someone rapped on the elevator shaft for him, and the boy forgetting that the elevator was not on the third floor, rushed through the open door into the elevator well and fell down the shaft. Held (per Elwood, J. A., Haultain, C.J.S., and Lamont, J.A., concurring) that the fair conclusion from the evidence was that the boy took the elevator to the third floor, got out of it, left the door of the elevator open, as was proper, and delivered the messages for which he was sent; that while he was absent some person moved the elevator up to the fourth floor, leaving the door of the third floor open, and that the boy, after delivering his messages, came back, stepped through the open doorway, and then fell down the shaft, and that upon these findings the accident arose out of and in the course of the boy's employment. Held, (per Newlands, J.A.), that the boy's duties would naturally take him to the doors of the elevator shaft on each floor, and that, therefore, even on the facts as found by the district court judge, the accident arose out of and in the course of deceased's employment.

Mills v. Sherwood Stores, 11 S.L.R. 119, [1918] 1 W.W.R. 889. [See also 42 D.L.R. 696, [1918] 2 W.W.R. 1030.]

ACCIDENT IN COURSE OF EMPLOYMENT.

In considering whether an accident to a workman arose out of and in the course of his employment within the meaning of the Workmen's Compensation Act, ch. 12, 1908, the following test, put by Lord Sumner in Lancashire & Yorkshire R. Co. v. Highley [1917] A.C. 352 at p. 372: "Was it part of the injured person's employment to hazard, to suffer or to do that which caused his injury? If yea, the accident arose out of his employment. If nay, it did not, because while it was not part of the employment to hazard, to suffer or to do cannot well be the cause of an accident arising out of the employment" was applied and the employer held not liable.

Powell v. Thomas, Jamieson & MacKenzie (Alta.), [1918] 3 W.W.R. 901.

ACTION FOR RENT OR CAPITAL.

A plaintiff, in an action under the Workmen's Compensation Act, as amended, may sue for either the annual rent or the capital, and even if he elects to sue for the annual rent he may, at any time, even after judgment, make option for and recover the capital representing such rent. [See annotation, 7 D.L.R. 5.]

Freeman v. Montreal Locomotive Works, 39 D.L.R. 239, 24 Rev. de Jur. 67.

AWARD OF LUMP SUM—VALIDITY—NEGLECT OF CURE.

Under the Workmen's Compensation Act, R.S.B.C., 1911, ch. 244, an award of a lump sum should be upheld where it is not awarded as such but is merely the result of the addition of the several amounts of a weekly allowance. An applicant for compensation under the Workmen's Compensation Act, R.S.B.C. 1911, ch. 244, is not entitled to compensation beyond the date when he neglected to follow the instruction of his medical advisers which would, if

followed, have effected a cure. The applicant who is cured, and he who refuses to be cured, are on the same legal footing.

Gorgnigiani v. Welch (B.C.), [1918] 3 W.W.R. 797.

DEATH OF BOY—FATHER PARTIALLY DEPENDENT.

The compensation awarded for the death of a fifteen year old boy, who lived at home with his father and mother, and on whose earnings the father is partially dependent for the support of his family, should be the maximum amount allowed by the Workmen's Compensation Act (1910-11 Sask., ch. 9, sec. 15).

Mills v. Sherwood Stores (Sask.), 42 D.L.R. 696, [1918] 2 W.W.R. 1030. [See 11 S.L.R. 119].

RIGHTS OF FOREIGNER—TEMPORARY RESIDENCE.

Temporary residence in Canada, while looking for a re-engagement on lake vessels, does not entitle a foreigner to the benefit of the Workmen's Compensation Act under article 7324, R.S. Que., 1909, as a resident of Canada.

McCarthy v. Mathews Steamship Co., 41 D.L.R. 122, 24 Rev. de Jur. 191. [See 24 Rev. Leg. 325.]

WORKMEN'S COMPENSATION—FAILURE OF COMMON LAW ACTION—APPLICATION FOR COMPENSATION—LIABILITY OF MUNICIPAL STREET RAILWAY.

City of Regina v. Western Trust Co., 39 D.L.R. 759, 55 Can. S.C.R. 628, [1917] 3 W.W.R. 1055, affirming 30 D.L.R. 548, 9 S.L.R. 336; 24 D.L.R. 26.

RELEASE—BEFORE AND AFTER INJURY.

Section 4 (2) of the Workmen's Compensation Act (Sask. St. 1910-11, ch. 9) applies to contracts entered into before injury, by which a workman contracts himself out of the Act, but not to contracts in settlement, after the injury has been received.

Carr v. Imperial Oil Co., Ltd., 38 D.L.R. 154, 10 S.L.R. 429, [1918] 1 W.W.R. 89.

EMPLOYEES' RELIEF FUND — VALIDITY OF CONTRACT—ESTOPPEL.

The agreement of an employee of the Intercolonial Railway, as a condition to his employment, to become a member of the temporary employees' relief and insurance association, and under its constitution and by-laws to accept its benefits in lieu of all claims for personal injury, is perfectly valid and may be set up as a complete bar to his action against the Crown for injuries sustained in the course of employment; by accepting the benefits he will be estopped from setting up any claim inconsistent with the rules and regulations.

Gagnon v. the King, 41 D.L.R. 493, 17 Can. Ex. 301.

FRENCH AND QUEBEC LAW—RIGHTS OF PARENTS.

The French law relating to accidents to workmen is different from the law of the Province of Quebec as to the rights of parents to claim compensation. Under the French law it suffices that the parents are in need, but under the law of Quebec the victim must have been the sole support of the parents.

Picard v. Montreal Public Service Corp., 24 Rev. de Jur. 142.

CONFLICT OF LAWS.

An employee, the victim of an accident, who had been engaged at Montreal to go and work in a workshop at Port Arthur, Ontario, may invoke the benefits of the Workmen's Compensation Act of Quebec, even if he has already obtained compensation under the Workmen's Compensation Act of Ontario. But the court should take into account what he has already received.

Burdeau v. Dominion Bridge Co., 54 Que. S.C. 363.

INEXCUSABLE FAULT — COMMON LAW—STATUTE.

It is an established principle that a statute never abrogates the common law unless there is an express clause to that effect, or unless there are provisions which clearly show an intention of setting it aside. Thus, the Workmen's Compensation Act having in no way, as far as the liability of the employer towards his men and employees is concerned, set aside the common law, the employer is liable for the inexcusable fault not only of all those appointed by him for the operation of his undertaking, but also of all those employed by him in whatsoever capacity.

Montreal Tramways Co., v. Savignac, 27 Que. K.B. 246.

"INEXCUSABLE FAULT."

An inexcusable fault is a greater, more serious and less pardonable fault than a gross mistake. It occupies an appropriate place between a gross mistake and fraud. It is more serious than a gross mistake, but less serious than fraud; it is not deceitful, but quasi-deceitful. So an employer who sets a boy of 17 at an easy work near a dangerous machine, without giving him special instructions, is not guilty of an inexcusable fault if the danger from the machine is obvious and easy to avoid.

Belgo-Canadian Pulp and Paper Co. v. Millette, 27 Que. K.B. 11.

INEXCUSABLE FAULT—DUTY OF PROTECTION.

Under the Workmen's Compensation Act, the inexcusable fault must contain as an element some voluntary act on the part of the person guilty, which is likely to produce injury or death. Therefore it is not inexcusable fault for an employer to have certain work performed by one man in-

stead of by two, and not to furnish his employee, a boilermaker, with lunette to protect his eyes as provided by a city by-law, when this kind of work has been done for a number of years in the manner in which it was done during plaintiff's engagement without the occurrence of any accident.

Smith v. J. R. Weir, 53 Que. S.C. 51. [See 19 Que. P.R. 134.]

INEXCUSABLE FAULT—DISOBEDIENCE OF INSTRUCTIONS—ENGINEER.

It is only voluntary acts which are done with a knowledge of the danger and a carelessness for result which are considered inexcusable within the meaning of the Workmen's Compensation Act. So where the accident is the result of a negligent attention to instructions on the part of an engineer or upon some other cause which led him to think that an engine had to be started, there is no inexcusable fault.

Lennon v. Montreal Transportation Co., 53 Que. S.C. 239.

INEXCUSABLE FAULT—SAW MILL—CLOTHING.

The persistence of an employee in a workshop in clothing himself, in spite of his employer's remonstrances, in a long flowing dust coat to do his work in proximity to the saws and belts, constitutes an inexcusable fault of a nature to justify the court in reducing the compensation, when the workman is a victim of such gross imprudence in an accident while at work.

Fontaine v. Paradis, 54 Que. S.C. 468.

DANGEROUS ESTABLISHMENT—INEXCUSABLE FAULT—INFANT.

A manufacture of metallic corks for bottles falls within the class of dangerous establishments under art. 3833, R.S.Q. The owner who employs there an infant under 16 years of age is guilty of an inexcusable fault in the event of an accident.

Vanier v. Bouthillier, 54 Que. S.C. 407.

INEXCUSABLE FAULT—ELECTRIC SHOCK.

If a workman, working upon a scaffold erected outside a car, receives an electric shock and is thrown down, and suffers severe injuries, it is not inexcusable fault on the part of the company which placed the electric wires across the scaffold for the purpose of lighting the interior of its cars.

Canadian Pacific R. Co. v. Ferrari, 27 Que. K.B. 334.

INEXCUSABLE FAULT—PRECAUTIONS.

"Inexcusable fault," under the law of accidents to workmen, is a fault almost voluntary and quasi-malicious. So it is not an inexcusable fault when (a) an employer appeared to have taken certain precautions to protect his workmen, as, for example, in explaining to them the workings of the machine at which the workman is required to work, and in ordering another workman in charge of a neighboring and similar machine to teach him his work; (b) but especially when the workman had already, before the accident, worked more than six hours at such machine, whose working was easy to understand and exhibited only a very obvious danger.

Rubber Regenerating Co. v. Manchuk, 27 Que. K.B. 129.

ACCIDENT ON DAY MILL WAS STOPPED.

The law of accident to workmen does not apply to an accident happening to a workman, outside of the factory, on a day when the mills were stopped, when he gave his assistance to a work which was purely one of recreation, upon the courteous invitation of his foreman, and at the latter's private residence.

Brown Corp. v. Carrier, 27 Que. K.B. 17.

MANUFACTURER AND TRADER—JOINT EMPLOYMENT.

Where an employer is both a trader and manufacturer, a workman or his representatives who makes a claim under the Workmen's Compensation Act, must establish that, at the time of the accident, the workman in question was assisting in the industrial operations of the employer, as well as in his commercial work, and that the accident occurred in the course of the industrial operation. Therefore, a night watchman, employed by a company whose business is the manufacture and sale of petroleum products, and to whom it was ordered by his employer to deliver a wagon loaded with gasoline to certain districts outside of Montreal, has no claim under the above law if he is killed by a passing train while returning from his duty.

Caron v. Imperial Oil Co., 54 Que. S.C. 394.

RIGHT TO VIEW PLACE OF ACCIDENT.

A plaintiff in an action under the Workmen's Compensation Act cannot, before the trial, obtain permission to visit the place where the accident occurred.

Stychlinsky v. Canadian Steel Foundries, 20 Que. P.R. 130.

REMEDIES—STATUTORY—COMMON LAW.

The sole recourse which the law gives a workman, the victim of an accident in the course of employment, is by proceeding under the Workmen's Compensation Act, with the authorization of a judge of the superior court. He cannot sue under the common law.

Goupil v. Van, 24 Rev. Leg. 192.

ACTION AT COMMON LAW—DAMAGES.

Held, the accident in question having happened while plaintiff was working for defendants, he could only proceed in virtue of the Workmen's Compensation Act; and having to prove inexcusable fault on the part of defendants, his action, under the common law, must be declared unfounded.

Desormeaux v. Dupre, 24 Rev. de Jur. 196.

ACTION BY MINOR.

A minor over 14 years of age may, with the authority of a judge, bring an action under the Workmen's Compensation Act.

Therriault v. Caron, 19 Que. P.R. 213.

An action brought under the Workmen's Compensation Act is not based on the contract of hire of services, but on the fault of the employer; and a minor cannot bring such action unless through his guardian.

Delangie v. Montreal Machine Shop, 20 Que. P.R. 208.

REMEDY OF ASCENDANTS—SOLE SUPPORT.

The only ascendants who have a right to an indemnity for the death of their child, in an accident to a workman, are those of whom the victim was their sole support at the moment of the accident. A right of action is not open to those of whom the victim was one support, even if the chief one. Whenever the provisions of the law of accidents to workmen differ from the common law, the former should be interpreted in a restrictive sense.

Price Brothers Co. v. Saint-Louis, 27 Que. K.B. 174.

Compensation should not be granted to the father and mother of an employee killed in the service of his employer, under par. c. of the law respecting accidents to workmen (R.S.Q., art. 7323), upon the ground that their son was their only support at the moment of the accident, if they were not in want. A father and mother who own in the country a farm which is paid for, worth $1,575, the father earning besides a salary of $400 a year, and their youngest child being 15 years old, are not in want.

Montreal Public Service Corp. v. Picard, 27 Que. K.B. 188.

PAYMENT OF RENT — INSURANCE—JUDGMENT—EXAMINATION OF DEFENDANT.

A defendant, condemned to pay a plaintiff a rent under the Workmen's Compensation Act, cannot, even if he has paid all he is bound to pay up to date, escape by offering to have the payment of the rent secured by an insurance company approved by an order-in-council, or by conservatory measures, such as the registering of the judgment against his property, or the examining of the defendant concerning his assets.

Smith v. Weir, 19 Que. P.R. 134. [See 53 Que. S.C. 51.]

CAPITAL—DELAY—COSTS—INSURANCE.

One suing under the Workmen's Compensation Act may, within a month from the judgment condemning his employer to pay an annual rent, ask that the capital be paid to him. The capital of a rent, granted to an employee under the Workmen's Compensation Act, must not be diminished by the costs which an insurance company would deduct for administering the capital and distributing it in periodical payments.

Okopny v. Atlas Construction Co., 24 Rev. Leg. 371.

PERMANENT PARTIAL INCAPACITY—ANNUAL RENT.

The right of the victim of an accident under the Workmen's Compensation Act, to recover for permanent partial incapacity, depends upon the amount by which his wages have been reduced in consequence of the accident.

Smith v. G.T.R. Co., 53 Que. S.C. 334.

PARTIAL PERMANENT INCAPACITY—APPEAL—PROVISIONAL ALLOWANCE.

If a final judgment of the superior court has declared that the plaintiff is partially and permanently incapacitated, and it is not claimed that his conditon has altered since the judgment, he will not be granted a daily provisional allowance during the proceedings in review.

Sabatino v. Peck Rolling Mills, 20 Que. P.R. 148.

AMOUNT ADMITTED—JUDGMENT.

In an action under the Workmen's Compensation Act, if the defendant admits owing a certain amount, and consents to a judgment being given for such amount, the court can give judgment for such amount upon the plaintiff's petition during the litigation, reserving to him the right to continue the action for the remainder of the claim.

Rossi v. Scottish Canadian Magnesite Co., 54 Que. S.C. 511.

STIPULATED JUDGMENT—REMEDY—REVISION OF INDEMNITY—DAILY ALLOWANCE.

The stipulated judgment, under sec. 27 of the Workmen's Compensation Act (9 Ed. VII., ch. 66), on a workman's petition asking authorization to sue, having the same effect as a final judgment from a proper tribunal, must be attacked by the same means and not by those provided to have transactions set aside. The means of appeal or review before three judges, granted by sec. 22 of the Act, are not granted against the stipulated judgment rendered under sec. 27, because the parties have acquiesced therein, and because the law makes no distinction between the acquiescence before or after the delivery of judgment. Such a judgment, therefore, can be withdrawn only by a petition in revocation, because the main action has never been recognized in the French law, as a means of attacking judgment. Such a judgment is none the less subject to be set aside, but according to the special provisions concerning transactions (arts. 1921, et seq., C.C. Que.), and not according to those concerning ordinary contracts (arts. 991 to 1001, C.C., Que.). So an error of law can never be a ground to have such a judgment withdrawn (art. 1921 C.C., Que.). There is no other remedy against such judgment, besides the petition in revocation, than the action to revise the indemnity granted to each party by sec. 26 of the Act. The Quebec Code, different from the French

law, enacts the principle that a party may always desist from his claim or proceedings without the consent of the opposite party, provided he pays the costs, but only from a judgment given exclusively in his favor. A judgment condemning the defendants, with their consent, to pay the plaintiff the sum of $67.50, provided the latter renounces any damages suffered from the accident, is not exclusively in favor of the plaintiff, and he could not, except with the defendant's consent, desist from that judgment, which at his request, was ratified by the court under sec. 27 of the Act. A workman, who takes an action to revise the indemnity granted him by a stipulated judgment, cannot, during the trial in review, ask for alimony in the form of a daily allowance. The only indemnities which sec. 26 of the Act authorizes in cases of revision of within four years from the agreement of the parties or the final judgment, are those of absolute and permanent incapacity, which have been fixed either by the stipulated judgment ratifying the agreement of the parties according to sec. 27, or, in case of disagreement, by the judgment rendered under sec. 3. In other words, the absolute and permanent incapacity, mentioned in sub-par. (a) of sec. 2 of the Act, is the only one which, in case of aggravation, may justify an action to revise.

St. Jacques v. Le Cure, etc., de la Paroisse St. Jean Berchmans, 19 Que. P.R. 30.

PROVISIONAL ALLOWANCE.

An application for a provisional daily allowance, made during an action under the Workmen's Compensation Act, cannot be contested in writing without previous permission of a judge, but should be adjudged upon summarily, at the discretion of the court or a judge.

Blair v. Allen Scott Roofers, 20 Que. P.R. 114.

Where the plaintiff, after the accident complained of, was again able to work and settled with his employer, obtains permission to sue again, on alleging new facts, he has no right, during the new proceedings, to a provisional allowance.

Harris v. Peck Rolling Mills, 20 Que. P.R. 149.

The provisional daily allowance, in the course of an action under the Workmen's Compensation Act, is left to the discretion of the court, which should only be exercised for important reasons, for example, when the liability of the employer is certain, or the employee is unable to work, etc.

Schinck v. Galibert, 19 Que. P.R. 130.

PROVISIONAL ALLOWANCE—SALARY.

An application for a provisional allowance under the Workmen's Compensation Act, made 6 days before the hearing, and the defendant denies the plaintiff's right for the reason that he earns an annual salary of more than $1,000, will be transferred to the court seized of the case.

Jourdain v. Canada Box Board Co., 19 Que. P.R. 181.

COMPUTATION OF ANNUAL SALARY.

The annual salary entitling one to invoke the Workmen's Compensation Act, as also the annual salary used as a basis to calculate the rents, mean the real wages allowed to the victim during the twelve months before the accident, and those wages must include the allowances granted for extra work according to contract.

Laferriere v. Frontenac Electric Laundry, 19 Que. P.R. 369.

AVERAGE WAGE—COMPUTATION.

Where a workman, the victim of an accident, has been less than twelve months in his employment, in order to fix his annual wages there must be added to what he actually earned during the period of his employment the average wages received by workmen of the same class during the period required to complete the 12 months. Such average wage is computed, when the workmen are paid by the hour, by dividing the total amount which they received during the supplementary period by the number of hours which they worked during the same period.

St. Maurice Paper Co. v. Marcotte, 27 Que. K.B. 394.

DAILY ALLOWANCE.

A provisional allowance should not be granted to a plaintiff suing under the Workmen's Compensation Act, if his right of action is contested and doubtful, or if it is susceptible of only giving a reduced rent which would be absorbed by the provision paid during the trial.

Yukerviez v. Grand Trunk R. Co., 19 Que. P.R. 151.

Art. 7343, R.S.Q., authorizing a judge, in an action under the Workmen's Compensation Act, to grant the plaintiff a daily allowance, should be construed strictly. So, when the employer pleads, apparently with reason, that that law does not apply because the employee earns more than $1,000 a year, the application will be refused.

Tremblay v. Canada Cement Co., 24 Rev. Leg. 444, 20 Que. P.R. 13.

If a defendant pleads that the plaintiff makes more than $1,000 a year, and does not fall under the Workmen's Compensation Act, a plea which appeared primâ facie well founded, the plaintiff will not get, during the proceedings, any daily allowance.

Sayed v. Canadian Tube & Iron Co., 19 Que. P.R. 1.

SETTLEMENT OF CASE — CONFIRMATION—CAPITAL—VALIDITY.

After the service of the petition for authority to sue under the Workmen's Compensation Act, the parties may settle their dispute, with the sanction of the court, and

such arrangement may extend to the payment of the capital. Such an agreement can only be set aside on the grounds which allow the cancellation of agreements.

Patenaude v. Canada Cement Co., 54 Que. S.C. 216. [See 20 Que. P.R. 241.]

SETTLEMENT—CONTINUANCE OF PROCEEDINGS.

If an action under the Workmen's Compensation Act is settled between the parties, and the plaintiff, complaining of the illegality of the settlement, continues the proceedings, the parties should proceed to prove the sufficiency of the amount paid.

Patenaude v. Canada Cement Co., 20 Que. P.R. 241. [See 54 Que. S.C. 216.]

COSTS AND INTEREST.

The indemnity granted by art. 7332 of the Workmen's Compensation Act is offset by the costs which the employee owes his employer; that is, the latter has a right to deduct from the amount of the indemnity granted to the employee the costs which the employee has been condemned to pay. It is a sure principle that a court ought not to make a distinction where the law makes none, and to create exceptions which the law has evidently not wanted to declare by not including them in the provisions of the law. It is certain and invariable that the winning party remains, notwithstanding the distraction of the costs, bound to pay his attorney's costs; and should that party pay them, he is subrogated de jure by the sole effect of the law, to the rights of his attorney, and may execute the judgment for those costs without transfer or previous service, by complying with the formalities and conditions of art. 555 C.C.P. As costs bear interest from the date of the judgment granting them, it is not necessary for the judge to add the words, "with interest."

Trudel v. Rhéaume, 54 Que. S.C. 292.

EXECUTION OF JUDGMENT.—PREMATURITY.

An execution, obtained less than a month after the final judgment given under the Workmen's Compensation Act in favor of a workman permanently incapacitated, is premature and illegal.

Manchuch v. Rubber Regenerating Co., 20 Que. P.R. 8.

MATERIALMEN.

See Mechanics' Liens.

MECHANICS' LIENS.

I. CONSTRUCTION AND VALIDITY OF STATUTES.
II. THE RIGHT; WHEN LIEN EXISTS.
III. PRIORITIES.
IV. FOR WHAT WORK OR MATERIALS.
V. TO WHAT PROPERTY ATTACHES.
VI. OF SUB-CONTRACTORS AND MATERIALMEN.
VII. HOW WAIVED OR DEFEATED.
VIII. ENFORCEMENT; PROCEDURE.

For liens in general, see Liens; Maritime Liens.

Annotations.

Percentage fund to protect sub-contractors: 16 D.L.R. 121.

What persons have a right to file a mechanic's lien: 9 D.L.R. 105.

I. Construction and validity of statutes.

(§ I—1)—AMENDMENT OF STATUTE—CONSTRUCTION.

In order to enforce a mechanic's or materialman's lien under the Alberta Mechanics' Lien Act, sec. 32, as amended in 1908, a "notice in writing of such lien and of the amount thereof" must be given to the "owner or person having superintendence of the work on behalf of the owner."

City of Calgary v. Dominion Radiator Co., 40 D.L.R. 65, 56 Can. S.C.R. 141, [1918] 1 W.W.R. 137, reversing 35 D.L.R. 410, 11 A.L.R. 532 sub. nom. Dominion Radiator Co. v. Payne.

CONSTITUTIONALITY—DOMINION RAILWAY—JURISDICTION — PERSONAL JUDGMENT—COUNTY OR DISTRICT COURT.

A lien claimed under the Mechanics and Wage-Earners Lien Act, R.S.O. 1914, ch. 140, cannot exist or be enforced against the property of the Canadian Northern Railway Company—a Dominion company. [Crawford v. Tilden (1907), 14 O.L.R. 572, followed.] Although the lien claimed cannot be enforced in an action brought under the Act, the plaintiff may proceed to judgment under sec. 49. [Kendler v. Bernstock (1915), 22 D.L.R. 475; Baines v. Curley (1916), 33 D.L.R. 309, applied.] The provisions of sec. 33 of the Act, as enacted by the amending Act, 6 Geo. V. ch. 30, sec. 1, are intra vires of the Ontario Legislature, so far as it is thereby directed that an action brought under the Act shall be tried, outside of the County of York, before a Judge of the County or district Court of the county or district in which the land is situate.

Johnson & Carey Co. v. C.N.R. Co., 43 O.L.R. 10, reversed in 15 O.W.N. 279. [See 10 O.W.N. 372.]

II. The right; when lien exists.

(§ II—5)—REGISTRATION—NOTICE — LETTER.

A letter by a contractor to the proprietor notifying him that his work is terminated, in the absence of any proof to the contrary will be considered as fixing the date upon which the building has become ready for the purpose for which it is intended, and in which the builder may register a privilege under art. 2013b, C.C.

Weiss v. Silverman, 24 Rev. Leg. 204. [Reversed by Supreme Court of Canada.]

REQUEST OF OWNER—AGREEMENT OF SALE—COVENANT TO BUILD—LIEN FOR PREPARING WORK.

An agreement for the sale of land which

contains a covenant binding the purchaser to erect certain works on the land at a certain cost and contains a covenant by the vendor, the owner, to remit a specified amount from the purchase price on the completion of said undertaking, is such a request in writing as gives a mechanic's lien arising from the erection of the said works general application under sec. 6 of the Mechanics' Lien Act, B.C., 1916, ch. 154, and therefore the lien is not restricted to the increase in value of the premises by reason of such works. There is no lien under the Mechanics' Lien Act, R.S.B.C. 1911, ch. 154, in respect to the cost of preparing for work to be done upon a site, although such work has been frustrated without fault of the contractor.

British Columbia Granitoid Co. v. Dominion Shipbuilding, Engineering & Dry Dock Co. (B.C.), [1918] 2 W.W.R. 919.

III. Priorities.

(§ III—10)—EXECUTIONS — SECOND MECHANIC'S LIEN—PRIORITIES.

Beaver Lumber Co. v. Quebec Bank, 42 D.L.R. 779, 11 S.L.R. 320, [1918] 2 W.W.R. 1052.

IV. For what work or materials.

(§ IV—15)—ALL MATERIALS—TIME FOR FILING.

A mechanic's lien will attach for all materials supplied in the erection of a building, although the time for filing has expired as to certain classes of material, ordered at a different time, where it is shewn that there was a prior agreement to purchase all material required for the building from such vendor.

Whitlock v. Loney, 38 D.L.R. 52, 10 S.L.R. 377.

(§ IV—28)—MATERIAL ON LAND.

The general lien under sec. 6 of the Mechanics and Wage Earners Lien Act (Ont.) and the special one in the nature of a vendor's lien upon the material itself, depend upon the placing upon the land to be affected of the material in question. Proximity to the land is not enough; it must be on it, so that in fact or in contemplation of law the value of the land itself is enhanced by its presence. [Ed. Note:—By 8 Geo. V., ch. 29, sec. 1 (Ont.), assented to March 26th, 1918, sec. 6 of the Mechanics and Wage Earners Lien Act, R.S.O. 1914, ch. 140, is amended by adding after the word "upon" in the eighteenth line thereof the words "or adjacent to."]

Milton Pressed Brick Co. v. Whalley, 42 D.L.R. 395, 42 O.L.R. 369.

V. To what property attaches.

(§ V—30)—INCREASED SELLING VALUE.

Where land has a potential value as a future business site, and is subject to a mechanic's lien for material used in erecting a building thereon, the proper method of determining the increased selling value occasioned by the building, is to ascertain the value of the property without the building, and then sell the whole property.

Whitlock v. Loney, 38 D.L.R. 52, 10 S.L.R. 377.

SQUATTER ON CROWN LAND — AFFIDAVITS — SUFFICIENCY.

Where a squatter on Crown land accepts work and materials applied to the erection of a building thereon, he holds himself out to be the owner of the land within the meaning of the Mechanics' Lien Act, and in an action under the Act to enforce a lien will not be permitted to escape liability on the ground that he has no interest in the land. Certain irregularities in affidavits of a mechanics' lien held not to render the affidavits insufficient.

Macdonald v. Hartley (B.C.), [1918] 3 W.W.R. 910.

(§ V—32)—CONSOLIDATION OF LIENS.

The provisions of the Mechanics' Lien Act of New Brunswick (C.S.N.B. 1903, ch. 147) although allowing any number of lien holders to be joined in one suit do not enable a lien holder to consolidate liens against several different buildings. Each individual building must bear the burden of its own construction.

O'Brien v. Fraser and Gallagher, 41 D.L.R. 324, 45 N.B.R. 539.

VI. Of sub-contractors and materialmen.

(§ VI—45)—OF MATERIALMEN — QUEBEC LAW—REGISTRATION—PRACTICE.

By the passing of statute of 1904, 4 Ed-VII., ch. 43, the legislature of Quebec has explicitly given to the supplier of materials a right of privilege, by adding to arts. 2013 and 2013a, C.C. (Que.), the words "the supplier of materials," and consequently the latter has now a privilege on the increased value and not only an hypothec on the whole property. Since the passing of that statute, the supplier of materials is one of the privileged creditors by art. 2013, which declares a lien for the privilege as for the other privileges created by art. 2013. Under art. 2103, the creditors' privilege mentioned in art. 2013 (which includes the supplier of materials privilege) "dates only from the registration within the proper delay"; in order to fix that delay, one has to look for it by analogy in arts. 2013b and 2013c, and that delay must accordingly be the same one, namely, thirty days after the building is completed. The obligation imposed by law to the supplier of materials to preserve his right and privilege of notifying the owner, is sufficiently fulfilled when, before delivering the materials, the supplier obtains delivery receipts signed by the owner or by his authorized employees. Held, from the deeds filed, that the notices required by law have been properly given; such notices could be legally given by the

defendant, the supplier of materials, to the plaintiffs' vendor during the whole course of the building as well before as after the plaintiffs' deed of acquisition; the defendant was not bound to register his privilege before the registering of plaintiffs' title; the defendant has notified the plaintiffs' vendors of the registering of his privilege and he has also notified the plaintiffs themselves; and finally, at the time of the institution of the present action, the defendant was still within the delays required by law to claim his said privilege.

Pacaud v. Limoges, 24 Rev. de Jur. 4.

NOTICE — MUNICIPALITY—POWERS OF OFFICERS.

The secretary-treasurer of a municipality who, in order to give effect to a resolution passed by the council ordering him to "bear in mind a notice" of privilege received from a supplier of materials, writes a letter to that creditor that "the city will retain for you the sum of $1,500," and subsequently informs that creditor that he has been instructed by the council to see "that a remittance is sent you on the next estimate filed," exceeds his powers and does not bind the municipality. If such creditor's privilege subsequently becomes null for lack of formalities, he has no recourse against the municipality, as the letters from the secretary-treasurer have created no legal relation between them. In a case where a garnishment becomes void owing to the creditor failing to take action within the three months following the notice (art. 2013i, C.C. Que), the owner is free from the obligation imposed on him by art. 2013h, of retaining, on the price of the building contract, an amount equal to that of the privileged claim.

Noiseux v. La Cité de Lachine, 24 Rev. Leg. 491.

VII. How waived or defeated.

(See previous Annual Digests.)

VIII. Enforcement; procedure.

(§VIII—60)—MATURITY—RIGHT OF ACTION —ALL CLAIMS.

When any part of a claim under the Mechanics and Wage Earners Lien Act (R.S.O. 1914, ch. 140) has matured, an action lies, and in that action all claims whether then payable or not are to be dealt with at the trial as provided for in sec. 37.

Northern Lumber Mills v. Rice, 40 D.L.R. 128, 41 O.L.R. 201.

(§VIII—66)—REGISTRATION—ACTION.

The words, in art. 2013b C.C., concerning the privilege on immovable with registration, "unless a suit be taken in the interval, or unless a longer delay for payment has been stipulated in the contract," refer to an action by the creditor to recover his claim during the year and not to anything relating to the validity of the privilege.

Waxman v. Girouard and Valentine, 24 Rev. Leg. 429.

REGISTRATION OF LIEN — PARTNERSHIP— COMPANY—PROOF OF EXECUTION.

Where a mechanics' lien has been filed by a partnership, even though it be trading under the name of what purports to be an incorporated company, the Registrar is justified in insisting that a discharge of the lien be executed by all the partners, or someone duly authorized on their behalf, and that proof be given him of the composition of the partnership.

Re Land Titles Act; Re Mechanics' Lien Act (Sask.), [1918] 1 W.W.R. 411.

MERCHANT SHIPPING.

See Shipping.

MILITARY LAW.

See also Militia.

War Relief Acts, see Moratorium.

MILITARY SERVICE ACT—SON OF NATURALIZED ALIEN — DISFRANCHISEMENT — HABEAS CORPUS—CONSTITUTIONAL LAW.

Naturalization of the father of the applicant, in 1913, under the Naturalization Act of Canada, had the effect of giving the applicant, then a minor, the capacity of a British subject and the enjoyment of the rights appertaining thereto. The War-Time Elections Act, of 1917, took away the applicant's right to vote, and as he could only be conscripted by reason of the enjoyment of such right, he thenceforth ceased to be subject to conscription, and consequently the applicant is not bound by the Military Service Act of 1917. The fact that the applicant had asked exemption before the local tribunals should not, under the circumstances, deprive him of the right to ask for the annulling, as applicable to him, of the order in council of April 20, 1918, which cancelled the exemptions granted to conscripts of 20, 21 and 22 years since the applicant was never subject to the Military Service Act of 1917. Sec. 6 of the War Measures Act of 1917 did not confer on the Governor-General in council the right to abolish or suspend the Habeas Corpus Act in this country; even if such right might be inferred from that section, the parliament which passed it had no constitutional right to do so, as the parliament of Canada has not the right to abolish the Habeas Corpus Act in this country, this right being restricted to the Imperial Parliament which has not deemed it proper to do. The order in council of April 20, 1918, is in conflict with the Imperial Acts, and therefore void.

Blanshay v. Piche, 24 Rev. de Jur. 578. [See 41 D.L.R. 147, 54 Que S.C. 170, 24 Rev. de Jur. 438.]

ENLISTMENT—DISCHARGE—ILLEGAL ARREST —HABEAS CORPUS—ARMY ACT.

One who voluntarily enlists in an expeditionary force for overseas, to serve in a war, and who, having left the service, following his discharge by a military medical board, as being permanently incapacitated, is arrested and arraigned before a police magistrate, who frees him, cannot be again placed under arrest by the military authorities; and if he is, he can demand his liberation by a writ of habeas corpus. The Army Transfer Act, 1915, does not apply to voluntary enlistment in this country, and only relates to the regular army.

Therrien v. Schneider, 53 Que. S.C. 246.

CONSCRIPTION — EXEMPTION — HABEAS CORPUS

One taken under the conscription law, who is temporarily exempted by a local tribunal from whose judgment no appeal has been taken, is not a deserter, and if he is arrested as such he can obtain his liberty by a writ of habeas corpus. If such conscript signs, by error, documents in which he agrees to enroll, believing that such documents were necessary to set him at liberty, he is not bound by the documents he signed.

St. Denis v. Gingras, 54 Que. S.C. 515.

DISOBEDIENCE OF LAWFUL MILITARY COMMANDS—REFUSAL TO DON UNIFORM—SENTENCE OF COURT MARTIAL—IMPRISONMENT WITH HARD LABOUR—APPLICATION FOR HABEAS CORPUS—ORDER-IN-COUNCIL SUSPENDING HABEAS CORPUS ACT IN RESPECT OF PERSONS IN MILITARY CUSTODY—VALIDITY — PENALTY FOR DISOBEDIENCE — CANADIAN MILITIA ACT, R.S.C. 1906, CH. 41, SEC. 122.

Re MacSwiney; Re Roche, 15 O.W.N. 266.

MILITIA.

See also Military Law; Soldiers; Army and Navy; Desertion.

(§ I—8)—DESERTION — ABSENT WITHOUT LEAVE.

The defendant was charged before the county stipendiary for that "he did on or about the 14th day of May, 1916, desert" (from the active militia of Canada) "and was absent from the same as a deserter until apprehended on the 31st day of August, 1918." The court held that the gist of the charge that the accused was absent as a deserter involved being absent without leave and he was properly convicted under par. 13 of the Canadian order-in-council passed 9th November, 1917.

The King v. Graves (N.S.), 43 D.L.R. 696.

MINES AND MINERALS.

I. ON PUBLIC LANDS.
A. Claims; location; re-location.
B. Work; abandonment; forfeiture.
C. Conflicting claims; contests.
II. ON PRIVATE LANDS.
A. In general, coal mines; quarries.
B. Oil and gas.
III. MINER'S LIENS.

I. On public lands.

A. CLAIMS; LOCATION; RE-LOCATION.

(§ I A—1)—GOLD COMMISSIONER—MINING RECORDER—POWERS.

The Governor-in-Council having appointed only one Gold Commissioner for the Yukon Territory, such Gold Commissioner has all the powers and authority of a mining recorder throughout the whole territory under the Yukon Placer Mining Act, R.S.C. 1906, ch. 64, secs. 3, 4, 5 and 6, as amended by 7 & 8 Edw. VII. ch. 77, sec. 25, without any direction to that effect by the Commissioner of the Yukon Territory.

Murphy and Gould v. the King, 39 D.L.R. 370, 55 Can. S.C.R. 550, reversing 27 D.L.R. 405, 16 Can. Ex. 81.

ORDER VESTING MINING LOCATIONS IN APPLICANT—MINING ACT OF ONTARIO, R.S.O. 1914, CH. 32—APPLICATION TO SET ASIDE ORDER AFTER EXPIRY OF THREE YEARS—ORDER MADE ON NOTICE—DELAY NOT SATISFACTORILY ACCOUNTED FOR—APPLICATION REFUSED—LEAVE TO APPEAL.

Re Hay and Engledue, 14 O.W.N. 90, affirmed in 15 O.W.N. 391.

II. On private lands.

A. IN GENERAL; COAL MINES; QUARRIES.

(§ II A—25)—PROPERTY IN TAILINGS.

"Tailings" from ore reduction, deposited by the defendant company and its predecessors in title in a lake the bed of which belonged to the plaintiff company, were so deposited without any bargain or understanding between the parties save such as might be inferred from a request upon the one side for permission to dump the tailings in the lake, and the granting of this permission on the other:—Held, that the tailings, when so deposited, became the property of the plaintiff company.

Peterson Lake Silver Cobalt Mining Co. v. Dominion Reduction Co., 41 O.L.R. 182, affirmed in 15 O.W.N. 175.

III. Miner's liens.

(See previous Annual Digests.)

MINORS.

See Infants; Parent and Child.

MISDEMEANOURS.

See Summary Convictions; Criminal Law.

MISDIRECTION.

See Trial; New Trial; Appeal.

MISFEASANCE.

Of directors, see Companies.

MISJOINDER.

See Pleading; Parties; Action.

MISREPRESENTATION.

See Fraud and Deceit; Contracts; Vendor and Purchaser; Insurance; Companies.

MISTAKE.

See Contracts; Vendor and Purchaser.

(§ III C—35)—Timber limit—Misdescription.

Where an agent locator makes a mistake in the description of a timber limit, so that it is not recognized by subsequent locators or in the office of the Surveyor-General, the principal has no right of action against subsequent locators who state the same claim and describe and register it properly.

Orde v. Rutter, 39 D.L.R. 456, 25 B.C.R. 45, [1918] 1 W.W.R. 735.

MORATORIUM.

See also Mortgage, VI. E—90.

Annotation.

Postponement of Payment Acts, construction and application: 22 D.L.R. 865.

(§I—1)—Volunteers and Reservists Relief Act—Discharged volunteer.

Sec. 3 of the Volunteers and Reservists Relief Act (Sask. stats. 1916, ch. 7), continues the protection afforded by the Act, until 6 months after the conclusion of the war; this protection applies to all who have once joined the Canadian forces as volunteers although subsequently discharged.

Colonial Investment & Loan Co. v. Smyth, 40 D.L.R. 586, 11 S.L.R. 186, [1918] 2 W.W.R. 482.

War Relief Act—Mortgage—Arrears of interest.

The War Relief Act (Alta. 1918, sec. 3) does not apply to proceedings pending at the time the Act came into operation, but after proceedings have been commenced a mortgagor may pay all arrears of interest and other charges leaving nothing but the principal in arrear, and proceedings, although properly commenced, could then only be continued in contravention of the section.

Re War Relief Act; Re Credit Foncier Franco-Canadien Co., 40 D.L.R. 542, 13 A.L.R. 303, [1918] 2 W.W.R. 475.

War Relief Amendment Act—Conflict of laws—Actions in England.

The War Relief Amendment Act, 1917, ch. 74, of British Columbia, relates to procedure only and therefore is no defence to an action in the English courts against a volunteer who enlisted in that province but upon whom service of process is made in England (Dicey, on Conflict of laws, 2nd ed., pp. 709, 710, quoted with approval).

Merchants Bank v. Eliot (Eng.), [1918] 1 W.W.R. 698.

Volunteers and Reservists Relief Act—Right of mortgagee to rent.

The fact that a mortgagor is a volunteer or reservist within the meaning of the Volunteers and Reservists Relief Act, ch. 6, 1916, is not a defence to an action to recover the rent or rental value of the mortgaged premises, provided the mortgage gives the mortgagee the right to collect the rent or rental value. In such a case the mortgagee is entitled to judgment for the payment of the rent or rental value and for the appointment of a receiver therefor and to an order for possession in default of payment until such default is remedied.

Mutual Life Assurance Co. v. Blackett (Alta.), [1918] 2 W.W.R. 521.

Where a mortgage is in arrears, the mortgagee is entitled to the rents or, in default of rent, to possession, although the wife of a volunteer claims an interest in the premises under an agreement of sale and has rented them to the wife of another volunteer.

General Financial Corporation v. Wood and McGregor (Alta.), [1918] 1 W.W.R. 780.

War Relief Act—Right of mortgagee to possession or rentable value.

On an application under sec. 9, War Relief Act, ch. 74, 1916, for leave to a mortgagee to enter into possession unless paid the rentable value of the mortgaged premises, the Court will have regard, not to the ability of the mortgagor to pay, but to the question whether there exists at the time of the application a sufficient equity in the mortgagor to make it reasonably certain, in the opinion of the Court, that the mortgagee will ultimately recover his principal and interest. If there is, leave will be refused; if not, it will be granted. In deciding what is the rentable value the Court has no discretion to fix an arbitrary rent, but must on evidence adduced decide what is the rentable value as fixed by the market at the time of the application.

Re War Relief Act (B.C.), [1918] 3 W.W.R. 475.

Volunteers and Reservists Relief Act—Mortgage—Foreclosure.

In an action upon a mortgage a mortgagee out of possession is not entitled between the time of the order nisi and the application for the final order to apply for possession.

Colonial Investment & Loan Co. v. Richardson & McMeans (Man.), [1918] 2 W.W.R. 389.

War Relief Act, sec. 2 (a & b), ch. 74, 1917—Secs. 2, 6, ch. 97, 1918—Foreclosure of mortgage—Defendant widow of soldier who died at the front.

Anderson v. Stollery (B.C.), [1918] 3 W.W.R. 580.

WAR RELIEF ACT AMENDED—PROCEDURE.

Any application dealing with an order made under the War Relief Act, and amendments must be made to the Court.

Pilkington v. Kent (B.C.), [1918] 3 W.W.R. 584.

LEAVE TO TAKE STEP IN ACTION—NOTICE OF APPEAL.

Sec. 8 of the War Relief Act Amendment Act, 1917, which came into force on the 19th May, 1917, provides that "every plaintiff or party commencing, instituting, or taking any proceedings in or out of court shall after service of the writ, notice, or other process whereby any proceedings in or out of court are instituted, and before taking any further step, furnish evidence to the satisfaction of such court or of the officer or tribunal in whose office or before which any proceedings out of court are being taken, that the defendant was not at the time of such service entitled to the benefit of this Act," etc. The writ was issued in this action on May 10th, 1917, and without the plaintiff complying with the above section the action was tried and judgment given in his favor on June 20th following. The defendant first raised the point that the plaintiff had not complied with the provisions of the War Relief Act in his notice of appeal. Held, that it is only when the plaintiff proposes to take a step in the action that he is required to obtain leave. In the present instance it is the defendant who is taking the step (i.e. giving notice of and bringing on the appeal), in which case the provisions of the Act do not apply.

Bell v. Johnston, 25 B.C.R. 82, [1918] 2 W.W.R. 549.

COMPANY—WINDING-UP—APPLICATION FOR UNDER DOMINION ACT—WAR RELIEF ACT, CH 74, 1916 (B.C.) — APPLICABILITY.

Re Winding-up Act and Robson Investment Co. (B.C.), [1918] 1 W.W.R. 779.

INSTRUMENT CHARGING LANDS — ASSIGNMENT OF AGREEMENT FOR SALE AS.

Mortgage and Agreement Purchase Co. v. Bell (Man.), [1918] 3 W.W.R. 844.

MORTGAGE.

I. NATURE, VALIDITY AND EFFECT.
- A. In general; delivery.
- B. What constitutes.
- C. What property covered; description of property.
- D. Validity.
- E. Rights and liabilities of parties generally.
- F. Trustees and bondholders.

II. PRIORITY.
- A. As to other mortgages.
- B. As to judgments and other liens and equities.

III. VENDEE OF MORTGAGOR; ASSUMPTION OF DEBT.

IV. ASSIGNMENT.

V. SATISFACTION; DISCHARGE; RELEASE.

VI. ENFORCEMENT.
- A. Generally; effect.
- B. On default of interest, instalment, taxes, etc.
- C. Who may foreclose; parties.
- D. Defences.
- E. Relief; decree; effect as to fund.
- F. Strict foreclosure; foreclosure by advertisement.
- G. Sale.
- H. Surplus; proceeds.
- I. Deficiency and judgment therefor.
- J. Subsequent suit.

VII. REDEMPTION.
- A. In general; right of.
- B. Who may redeem.
- C. Time; amount.
- D. Mode and effect.

Annotations.

Equitable rights on sale subject to mortgage: 14 D.L.R. 652.

Foreclosure; re-opening foreclosures: 17 D.L.R. 89.

Land titles (Torrens system); foreclosing mortgage made under Torrens system; jurisdiction: 14 D.L.R. 301.

Mortgages and land purchase agreements affected by moratorium: 22 D.L.R. 865.

Assumption of debt upon a transfer of the mortgaged premises: 25 D.L.R. 435.

Parol evidence that deed absolute intended as mortgage. 29 D.L.R. 125.

Power of sale in statutory form of mortgage: 31 D.L.R. 300.

Discharge of mortgage as re-conveyance: 31 D.L.R. 225.

Mortgage or charge signed in blank; assignment; consideration: 32 D.L.R. 26.

Statement of rate of interest in land mortgage: 32 D.L.R. 60.

Limitation of actions for redemption of mortgage: 36 D.L.R. 15.

Insurance on mortgaged property: 44 D.L.R. 24.

I. Nature, validity and effect.

See Land Titles.

A. IN GENERAL; DELIVERY.

(§ I A—3)—ACTION BY ADMINISTRATOR OF ESTATE OF DECEASED MORTGAGEE—DEFENCE OF MORTGAGOR — INSTRUMENT NOT INTENDED TO BE OPERATIVE OR INTENDED AS SECURITY FOR INTEREST ONLY—EVIDENCE—GIFT — DELIVERY OF INSTRUMENT — REGISTRATION — REGISTRY ACT, SEC. 50—POSSESSION OF INSTRUMENT BY MORTGAGOR.

Holmes v. Husband, 14 O.W.N. 267.

C. WHAT PROPERTY COVERED; DESCRIPTION OF PROPERTY.

(§ I C—10)—FIXTURES IN STORE—ATTORNMENT CLAUSE — LANDLORD AND TENANT.

The plaintiff was the mortgagee of land

upon which was a store containing articles usually regarded as trade-fixtures. The mortgagor sold and conveyed the land to W.; he also sold his stock of merchandise, chattels, and fixtures to W., and executed a bill of sale thereof. W. made a bill of the same property to B., and B. to the defendant F. In this action the plaintiff sought to restrain the defendants from removing such of the articles as he considered to form part of the freehold. The plaintiff's mortgage contained a clause by which the mortgagor attorned to the mortgagee and became tenant of the land at a rent equivalent to and payable at the same time as the interest:—Held, that by the mortgage all fixtures passed to the mortgagee, subject to the right to redeem; and, if the clause created the relationship of landlord and tenant, the fixtures were the landlord's and could not be removed by the tenant. But the true relationship was that of mortgagee and mortgagor; and the mortgagor by the mortgage of the land pledged all that could be regarded as fixtures in the widest sense of the term—all things actually fixed, and such things not actually fixed as were intended to form part of the inheritance. [Monti v. Barnes, [1901] 1 Q.B. 205, Southport and West Lancashire Banking Co. v. Thompson (1887), 37 Ch.D. 64, 70, Stack v. T. Eaton Co. (1902), 4 O.L.R. 335; Bing Kee v. Yick Chong (1910), 43 Can. S.C.R. 334, followed.]

Gordon v. Fraser, 43 O.L.R. 31.

D. VALIDITY.

(§ID—15)—SECURITY FOR ADVANCES—PROMISSORY NOTES—MORTGAGE ASSIGNED AS COLLATERAL SECURITY—ACTION ON MORTGAGE—COUNTER-CLAIM —DECLARATION OF INVALIDITY OF MORTGAGE AND ASSIGNMENT — EVIDENCE—FINDINGS OF TRIAL JUDGE—APPEAL—COSTS.

Cunningham v. Kelly, 14 O.W.N. 183, reversing 13 O.W.N. 342.

FRAUD OF MORTGAGEE—LAND CONVEYED BY MORTGAGOR TO ANOTHER—RIGHT OF ACTION OF MORTGAGOR FOR CANCELLATION OF MORTGAGE—PARTIES—MORTGAGE SET ASIDE AND REGISTRY VACATED.

Bennett v. Bennett, 14 O.W.N. 235.

E. RIGHTS AND LIABILITIES OF PARTIES.

(§IE—20)—COVENANT—JOINT OR SEVERAL —DEATH OF MORTGAGOR.

A covenant by three mortgagors that "the said mortgagors covenant with the said mortgagee that the mortgagors will pay the mortgage money and interest and observe the above proviso, and will pay all present and future taxes . . ." is a joint covenant only, and, therefore, if default in performance occurs after the death of one of the mortgagors his estate is not liable.

Lindley v. Vassar (B.C.), [1918] 1 W.W. R. 879, 25 B.C.R. 219.

COVENANT FOR FURTHER ASSURANCES—LAND TITLES ACT—TRANSFER OR VESTING ORDER.

Under a covenant in a mortgage under the Land Titles Act that the mortgagor, upon default, "will execute such further assurances of the land as may be requisite," the mortgagee is not entitled upon default by the mortgagor, to an order directing the mortgagor to execute a transfer of the mortgaged land or to a vesting order. The extended covenant for further assurances (sec. 70, the Land Titles Act), if applicable to a mortgage under the Act, can be so by analogy only, and the meaning thereof would seem to be that after default the mortgagor will do any act or execute any instrument necessary to perfect the security and support the mortgage.

Ritchie v. Edmonton Milling Co. (Alta.), [1918] 1 W.W.R. 537.

COLLATERAL AGREEMENTS AS TO RATE OF INTEREST—CLAIM IN MORTGAGE ACTION —RES JUDICATA—CHATTEL MORTGAGE— SALE—ACCOUNTING.

The plaintiff, with two others, in 1905 purchased from C. farm machinery, giving notes therefor bearing interest at 7% before maturity and 10% thereafter until paid, and as further security gave a lien on the machinery and certain land mortgages, the mortgages bearing interest at the rates specified in the notes. C. subsequently took proceedings in the court leading to the sale of the lands under the mortgages, and on the taking of the mortgage accounts before the local registrar, interest was allowed at 7% only, it being held that the increased rate of 10% on the arrears was not recoverable. The amount thus found to be due was fully satisfied out of the sale of the lands. In 1913, the plaintiff gave a chattel mortgage to the defendant, the International Harvester Co. of America, on an engine, part of the machinery in question. This engine the chattel mortgagee subsequently sold and out of the surplus proceeds remaining after payment of its claim paid to C. in satisfaction of an alleged lien of C. $392.85, this sum representing the amount claimed by C. in respect of the increased rate of interest specified in its collateral agreement and disallowed on the taking of the accounts in the mortgage proceedings. In an action for an accounting of the moneys received on the sale of the engine under the chattel mortgage, held, that the chattel mortgagee was a trustee of the surplus and as such had the right to pay and discharge out of the sale price any encumbrances prior to it. That the claim of C. was, however, one that could have been and should have been raised by C. in its mortgage action, and not having been there raised was res judicata and could not be asserted, and that therefore the payment in question to C. was not warranted.

Calder v. International Harvester Co., 11 S.L.R. 244, [1918] 2 W.W.R. 905.

BONUS FOR DELAY—CREDIT ON MORTGAGE-DEBT—MORTGAGE GIVEN FOR BALANCE OF PURCHASE-MONEY — MONEY-LENDERS ACT, SECS, 4, 5—APPLICATION OF—"MONEY LENT"—"COST OF LOAN"—INTEREST IN ARREAR—MORTGAGORS AND PURCHASERS RELIEF ACT—APPROPRIATION OF PAYMENTS—COSTS—PARTIES—ADDITION OF, IN MASTER'S OFFICE.

Walshaw v. Securities Limited, 15 O.W.N. 92.

F. TRUSTEES AND BONDHOLDERS.

(§IF—25) — TRUST DEED SECURING DEBENTURES—FORECLOSURE — COMPANY—WINDING-UP ACT.

The contention that when a company is being wound up under the Winding-up Act, R.S.C. 1906, ch. 144, an action for foreclosure of a mortgage given by the company does not lie, but the mortgagee is restricted to the remedy given by sec. 133 of said Act, can only prevail, if at all, when the case falls strictly within the class of cases mentioned in the section, and the case is not within such class if the mortgaged premises were never "in the hands, possession or custody of the liquidator"(per Macdonald, C.J.A.). Stewart v. LePage, 29 D.L.R. 607, should not be interpreted as holding that, even where leave has been granted (as was the fact in the present case) such an action is not maintainable (per McPhillips, J. A.). Galliher, J. A., concurred in upholding the right of action.

Michigan Trust Co. v. Canadian Puget Sound Lumber Co. (B.C.), [1918] 3 W.W. R. 273.

II. Priority.

(§II—35)—SUBSEQUENT MORTGAGE—MISTAKE—EQUITABLE RELIEF.

In an action upon a mortgage, held, that the defendant who had been a first mortgagee and had taken a conveyance of the property was not entitled to equitable relief on the ground of ignorance of the plaintiff's mortgage, the defendant, in the opinion of the Court, having known of the plaintiff's mortgage and there being no evidence of either a joint intention or an express agreement to take the land free from encumbrances, as was the case in Dean and Chapter v. McArthur, 9 Man. L.R. 391.

James v. Smyth (Man.), [1918] 3 W. W.R. 318.

(§ II—40)—ASSIGNMENT—TITLE—KNOWLEDGE OF PRIOR EQUITY—CAVEAT.

If a person takes title in his own name to land which he agreed to purchase, but which prior to obtaining title he has assigned to another, he holds such title as trustee to the extent of such other interest. If another creditor, having knowledge of the trust, takes a mortgage on the property, he cannot deprive the beneficial owners of their interest in the property unless they have by their conduct lost their right to priority. A caveat not being necessary to protect the beneficial interest, which is founded on contract, the withdrawal of such caveat cannot deprive the beneficial owners of their priority.

Boulter-Waugh v. Phillips, 42 D.L.R. 548, 11 S.L.R. 297, [1918] 3 W.W.R. 27. [Reversed by Supreme Court of Canada.]

III. Vendee of mortgagor; assumption of debt.

(See previous Annual Digests.)

IV. Assignment.

(See previous Annual Digests.)

V. Satisfaction; discharge; release.

(§V—60)—DISCHARGE—REGISTRATION OF—MORTGAGEE A COMPANY IN LIQUIDATION—EXECUTION OF DISCHARGE BY LIQUIDATOR—NECESSITY OF PROOF OF APPOINTMENT OF LIQUIDATOR.

Re Land Titles Act (Sask.), [1918] 3 W.W.R. 348.

VI. Enforcement.

A. GENERALLY; EFFECT.

(§VIA—70)—FORECLOSURE UNDER LAND TITLES ACT—SUIT UPON COVENANT—IMPLIED COVENANTS.

Even after foreclosure under the Land Titles Act, the mortgagee may sue upon the covenant for the payment of the mortgage moneys, though, if he does, the mortgagor, on payment of the debt, is entitled to redeem his property (dissenting judgment of Higgins, J., in Fink v. Robertson, 4 C.L.R 864, approved). When a mortgage is foreclosed under sec. 62a of the Land Titles Act, the mortgagee is not a transferee from the mortgagor, the mortgagor is not his transferor. The covenant implied by sec. 52 of the Land Titles Act has no application to the statutory transfer effected by a foreclosure order made under sub-sec. 16 of sec. 62a (per Anglin, J.). When the owner of the land under an ordinary decree of foreclosure absolute takes proceedings to recover possession of that land, he seeks possession of that which, by a title newly accrued, has for the first time become his property; and it can make no difference whether the title which he previously had as a mere encumbrancer was, or was not, protected by a legal estate. The possession which he now claims, and the right by virtue of which he seeks to recover it, are substantially different from the possession which he might before have claimed, and from the right by virtue of which he might have claimed it [per Idington, J., citing Heath v. Pugh, 6 Q.B.D. 345, at p. 360, and dictum of Lord Manners in Blake v. Foster, 2 Ball & Beatty, at p. 403]. The proviso added in 1916 to sec. 62 of the Land Titles Act is a distinct legislative recognition of the fact that the taking of

any or all the remedies under sec. 62a does not release the mortgage debt or extinguish the right of the mortgagee to proceed to enforce payment on the mortgagor's covenant (per Anglin, J.). All that was decided in Smith v. National Trust Co., 45 Can. S.C.R. 1, was that in a mortgage of property under the Manitoba Real Property Act (R.S.M., 1902, ch. 148) an express power of sale, at all events if it do not explicitly otherwise provide, must be exercised under and in accordance with the requirements of the sections of that Act governing the exercise of the statutory power of sale which it confers (per Anglin, J.).

Douglas v. Mutual Life Ass'ce Co. (Can.), 44 D.L.R. 115, 57 Can. S.C.R. 243, [1918] 3 W.W.R. 529, reversing 39 D.L.R. 601, 13 A.L.R. 18, which reversed 38 D.L.R. 459.

MORTGAGE NOT EXECUTED — ACTION FOR MONEY LENT — INTEREST — RATE — PLEADING—AMENDMENT.

In an action upon a mortgage where it is found that the defendant did not execute the mortgage but that moneys of the plaintiff were paid for, and to the defendant through an agent whom he had authorized to obtain a loan for him, the action should not be dismissed before he has paid back the money received and paid out for his benefit [Lodge v. National Union Invest. Co., [1907] 1 Ch. 300, 306], and the plaintiff should be allowed to amend his claim so as to make it one for the repayment of money lent, and the plaintiff should be allowed the rate of interest which the defendant had notice was claimed and which he did not object to [Last West Lumber Co. v. Haddad, 8 S.L.R. 407, 25 D.L.R. 529, followed]. The mortgage should not be cancelled nor the registration removed until such payment back by the defendant, where the court is satisfied the defendant intended to mortgage the land in question.

Northern Trust Co. v. Wasylkovsky [1918] 3 W.W.R. 204, 11 S.L.R. 388.

ACTION FOR FORECLOSURE—FORM OF JUDGMENT—FORECLOSURE WITH SIX MONTHS FOR REDEMPTION, OR SALE AFTER THREE MONTHS—COSTS.

Town of Wiarton v. Canada Casket Co., 14 O.W.N. 321.

ACTION FOR FORECLOSURE—MOTION FOR SUMMARY JUDGMENT—DEFENCE —INTEREST —COSTS—STAY OF PROCEEDINGS.

Mason v. Florence, 13 O.W.N. 289, 14 O.W.N. 344.

REFERENCE TO ASCERTAIN AMOUNT ADVANCED AND DUE—FINDING OF MASTER—CREDIBILITY OF WITNESSES—ENTRIES IN BOOK — SUSPICIOUS CIRCUMSTANCES—APPEAL—COSTS OF DEFENDING TITLE TO MORTGAGE ADDED TO MORTGAGE-DEBT—ATTACK MADE BY OWNER OF EQUITY OF REDEMPTION.

Way v. Shaw, 14 O.W.N. 310.

ACTION ON—TITLE OF MORTGAGEE—FAILURE TO IMPUGN—EVIDENCE—AMOUNT DUE—INTEREST.

Macdonell v. Keefer, 14 O.W.N. 25, affirmed in 15 O.W.N. 45.

FORECLOSURE — TITLE OF MORTGAGOR — REMEDY UPON MORTGAGOR'S COVENANT FOR PAYMENT — STATUTE OF LIMITATIONS—COUNTERCLAIM — BREACH OF AGREEMENT—STATUTE OF FRAUDS.

Curry v. Girardot, 15 O.W.N. 27, affirming 7 O.W.N. 642.

ACTION BY MORTGAGEE ON COVENANT FOR PAYMENT—MOTION TO STAY PROCEEDINGS—FORECLOSURE—PRESENT ABILITY TO RECONVEY MORTGAGED PREMISES—ABSENCE OF PREJUDICE TO MORTGAGOR.

Rea v. Polak, 15 O.W.N. 138.

B. ON DEFAULT OF INTEREST, INSTALMENT, TAXES, ETC.

(§ VI B—75)—MOTION FOR LEAVE TO BRING ACTION FOR FORECLOSURE WHERE PRINCIPAL ONLY IN ARREAR—MORTGAGE MADE BEFORE AUGUST, 1914—MORTGAGORS AND PURCHASERS RELIEF ACT—LEAVE GRANTED UNLESS PRINCIPAL REDUCED AND RATE OF INTEREST INCREASED.

Re Cruso v. Brown and Dolgoff, 14 O.W.N. 244.

E. RELIEF; DECREE; EFFECT AS TO FUND.

War Relief Act, Volunteers and Reservists, Mortgagors and Purchasers Relief Act, see Moratorium.

(§ VI E—90)—WAR RELIEF ACT—APPLICABILITY.

The War Relief Act (Man.) cannot be invoked against a mortgagee proceeding with a mortgage sale commenced prior to the passage of the Act.

Palmason v. Kjernested, 39 D.L.R. 237, 28 Man. L.R. 429, [1918] 1 W.W.R. 607, affirming 36 D.L.R. 448.

WAR RELIEF ACT—CLUB.

A mortgagee of the real property of a club incorporated under the Benevolent Society's Act is not affected in his proceedings to realize his security by foreclosure, by the provisions of the War Relief Act (B.C.) as amended in 1917, the land being held for the use of the corporate body.

Inman v. Western Club (B.C.), 40 D.L.R. 9, [1918] 2 W.W.R. 583.

MORTGAGORS AND PURCHASERS RELIEF ACT —DATE.

The prohibition against proceedings under the Mortgagors and Purchasers Act, 5 Geo. V. ch. 22 (Or), and the amendment thereto, 6 Geo. V. ch. 27 (O), and the Statute Law Amendment Act, 7 Geo. V. ch. 27 sec. 59, as to mortgages, is expressly and plainly confined to mortgages "made or executed prior to August 4, 1914." A mortgage made

after that date although in substance a renewal is not within the Acts.

Appelbe v. Windsor Security Co., 40 D. L.R. 256, 41 O.L.R. 217, reversing 40 O.L.R. 548. [See 42 O.L.R. 16.]

ORDER DISMISSING—RIGHT OF APPEAL—SUPREME COURT ACT.

The order of Sutherland, J., 40 O.L.R. 548, dismissing this action, having been set aside by an order made upon appeal to a Divisional Court of the Appellate Division, 40 D.L.R. 256, 41 O.L.R. 217, the defendants, having no defence upon the merits to the action, asked the same Divisional Court to add to its order a direction that judgment be entered in the action in favour of the plaintiff—the defendants' purpose being to have a judgment from which they could appeal to the Supreme Court of Canada. The application was opposed by the plaintiff, and was dismissed; the Court holding (1) that it was unnecessary, as a right of appeal existed even without the aid of the Act of 1913, 3 & 4 Geo. V. ch. 51, sec. 1, repealing para. (e) of sec. 2 of the Supreme Court Act, R.S.C. 1906, ch. 139, and substituting a new para. (e), which extended the right of appeal; and (2) that the defendants should not be given the conduct of the plaintiff's case against his will.

Appelbe v. Windsor Security Co., 42 O. L.R. 16.

MORTGAGORS AND PURCHASERS RELIEF ACT —DERIVATIVE MORTGAGE—STAY OF PROCEEDINGS.

The Mortgagors and Purchasers Relief Act, 1915, 5 Geo. V. ch. 22, is a statute calling for a liberal interpretation; and the case of a derivative mortgage falls within its provisions without doing any violence to them. Sec. 2 (1) (a) of the said Act and sec. 2 (d) of the Mortgages Act, R.S. O. 1914, ch. 112, considered. In the circumstances of this case, proceedings upon a derivative mortgage were stayed, at the instance of the mortgagees, the makers of the derivative mortgage. The intention of the Act is to permit delay; and delay should be granted so long as the ultimate recovery of the money is not jeopardised, and reasonable compensation by way of interest is paid.

Re Shepard and Rosevear and Moyes Chemical Co., Re Moyes Chemical Co. and Halsted, 42 O.L.R. 184.

ACCOUNTS—REOPENING AFTER ORDER NISI—ADDING COSTS.

Where, after an order nisi in a mortgage action the defendant is permitted to bring an action to enforce an alleged agreement to discharge the mortgage, and fails thereon, the plaintiff is entitled to have the accounts in the mortgage action opened up and to an allowance therein of the costs in the other action.

Dillabough v. Delaney (Sask.), [1918] 1 W.W.R. 795.

VEXATIOUS PROCEEDINGS—ACTION FOR ACCOUNT AND REDEMPTION—JUDGMENT FOR FORECLOSURE IN PREVIOUS ACTION—ATTEMPT TO OPEN UP—REFUSAL TO DISMISS ACTION AS FRIVOLOUS OR VEXATIOUS.

McFarlane v. Price, 14 O.W.N. 41.

G. SALE.

(§ VI G—105)—PROCEEDINGS UNDER POWER OF SALE.

A mortgagee of lands, who has brought an action to recover the mortgage-moneys, and for possession of the mortgaged lands until paid, is not thereby prevented from taking proceedings under a power of sale contained in the mortgage-deed. Sec. 29 of the Mortgages Act, R.S.O. 1914, ch. 112, has no application to such a case. [Stevens v. Theatres Limited, [1903] 1 Ch. 857, distinguished.]

Shields v. Shields, 43 O.L.R. 111.

POWER OF SALE—NOTICE — AUCTION-SALE—VALUE OF LAND—EXPERT TESTIMONY.

In an action by the assignee of the equity of redemption to set aside a sale of vacant land under the power of sale contained in the first mortgage, by the first mortgagee to the second mortgagee, it was held:—(1) That the right to sell, on three months' default, without notice, as stipulated for in the mortgage, was not lost by notice being given to some of those entitled to notice under an earlier provision in the mortgage by which the power of sale might be exercised after default for two months on 10 days' notice. (2) That, when the land, which consisted of two separate parcels, was offered for sale at public auction, each parcel should have been advertised and offered separately, instead of both together; but, as the land was not sold at the time that it was so offered, but later the sale actually made must be dealt with, without regarding the attempted sale as any real test of the selling value of the property. (3) That, upon the evidence, the sale to the second mortgagee, by private contract, after the land had been offered at public auction, was a real sale, and free from any taint or suspicion of wrongdoing. (4) That, considering all the circumstances, the sale at $350 a foot was not a sale at an undervalue, though there was expert evidence that the land was worth $400 a foot. Remarks upon the weight of expert testimony as to the value of land.

Uren v. Confederation Life Association, 40 O.L.R. 536.

SALE UNDER POWER—DUTY OF MORTGAGEE TO MORTGAGOR—BREACH — EVIDENCE—REPRESENTATIVE OF MORTGAGOR—JUDGMENT FOR REDEMPTION — INTEREST—COSTS.

Hoehn v. Marshall, 15 O.W.N. 200, reversing 14 O.W.N. 316.

H. SURPLUS; PROCEEDS.

(§VI H—130)—SURPLUS—TRUST.

Held, that a mortgagee who has sold land under power of sale is a trustee of the surplus proceeds remaining after the payment of its mortgage. That where a mortgagee is in doubt as to whom such surplus is payable he may at his own risk as to costs either with or without paying the money into court apply to the court under sec. 49 of the Trustee Act, R.S.S., 1909, ch. 46, and rule 642 of the Rules of Court for a determination of the rights of the claimants.

Re Cudmore and Law Union & Rock Ins. Co., 11 S.L.R. 221, [1918] 2 W.W.R. 862.

VII. Redemption.

C. TIME; AMOUNT.

(§ VII C—158) — AFTER CERTIFICATE OF TITLE.

Held, that where foreclosure proceedings are instituted in a court there is power to open up the foreclosure and fix a new date for redemption, even after a final order of foreclosure has been granted and certificate of title issued thereon to the mortgagee.

Colonial Investment v. McManus, 11 S. L.R. 61, [1918] 1 W.W.R. 561.

MOTIONS AND ORDERS.

NOTICE OF MOTION—RETURN—TIME.

When by special leave the time for the return of a notice of motion is curtailed, the leave must show the date when leave is given as well as the date returnable.

Blue Funnel Motor Line Co. v. City of Vancouver and B.C. Elec. R. Co. (B.C.), [1918] 3 W.W.R. 473

MOTOR VEHICLES.

See Automobiles.

MUNICIPAL CORPORATIONS.

I. IN GENERAL.
- A. Incorporation.
- B. Division or annexation.
- C. Dissolution, succession or substitution.
- D. Charter.

II. POWERS, DUTIES AND LIABILITIES.
- A. In general.
- B. Delegation of power.
- C. Legislative functions; ordinances; by-laws.
- D. Contracts generally; ultra vires contracts.
- E. Borrowing money; indebtedness.
- F. As to lights, water supply and other property and privileges.
- G. Liability for damages.
- GG. Collection of claims against.
- H. As to taxes.
- I. Examination of corporate books and records.

III. POWERS OF OFFICERS.

Annotations.

Authority to exempt from taxation: 11 D.L.R. 66.

By-laws and ordinances regulating the use of leased property; private markets: 1 D.L.R. 219.

Closing or opening streets: 9 D.L.R. 490.

Defective highway; notice of injury: 13 D.L.R. 886.

Drainage; natural watercourse; cost of work; power of referee: 21 D.L.R. 286.

Power to pass by-law regulating building permits: 7 D.L.R. 422.

License; power to revoke license to carry on business: 9 D.L.R. 411.

Liability of municipal corporations for non-repair of highways and bridges: 34 D.L.R. 589.

Ultra vires as defence in action on corporate contracts: 36 D.L.R. 107.

I. In general.

Municipal elections, see Elections.

A. INCORPORATION.

(§ I A—5)—COSTS OF INCORPORATION—BY-LAW.

A corporation of a town, in providing for payment of the costs of its incorporation, may order that the costs incurred for the same object by a certain member of its taxpayers in connection with a prior petition rejected by the legislature, should be charged to the municipality, if it is proved that the opposition to the first project was not justified in the public interest and that a part of the costs incurred on that occasion have benefitted the promoters of the second project.

Rioux v. La Ville des Trois-Pistoles, 54 Que. S.C. 410.

II. Powers, duties and liabilities.

A. IN GENERAL.

See Expropriation; Arbitration; Highways; Bridges; Schools; Drains and Sewers.

(§II A—30)—POWER OF LEGISLATURE AS TO.

On the creation of a municipal corporation, the legislature may confer on it the powers conferred upon municipal corporations generally by any particular law or body of laws in the province.

City of Wetaskiwin v. C. & E. Townsites, (Alta.), [1918] 3 W.W.R. 145. [Affirmed on appeal.]

DUTY OF COUNTY CORPORATION TO PROVIDE OFFICES AND FURNITURE AND SUPPLIES FOR COUNTY CROWN ATTORNEY AND CLERK OF PEACE—MUNICIPAL ACT, R.S.O. 1914 CH. 192, SEC. 377—REIMBURSEMENT OF MONEYS EXPENDED—MANDAMUS TO CORPORATION TO PROVIDE OFFICES—REMEDY AS TO FURNITURE AND SUPPLIES.

Hatton v. County of Peterborough, 15 O.W.N. 224.

GIFT OF MONEY TO "CATHOLIC ARMY HUTS"—RESOLUTION OF CITY COUNCIL—ULTRA VIRES—RESOLUTION PASSED IN 1918—MONEY PAYABLE IN 1919—STATUTORY POWERS OF COUNCILS—"AID TO ANY CHARITABLE INSTITUTION"—MUNICIPAL ACT, SEC. 398 (5).

Re Homan and City of Toronto, 45 D.L.R. 147, 43 O.L.R. 632, 15 O.W.N. 81.

C. LEGISLATIVE FUNCTIONS; ORDINANCES; BY-LAWS.

(§ II C—50) — INDICTABLE OFFENCES — ULTRA VIRES.

A municipal by-law attempting to deal with and impose punishment for an indictable offence already dealt with by the Criminal Code is ultra vires.

The King v. Lorette (Man.), 43 D.L.R. 129, 30 Can. Cr. Cas. 238, [1918] 3 W.W.R. 324.

PROTECTION AGAINST FIRE—ACCIDENT.

A by-law of the city of Vancouver and the legislative authority to make it "for causing all lands, buildings, and yards to be put in other respects in a safe condition to guard against fire and other dangerous risk and accident" (Vancouver Incorporation Act (1886, ch. 32, sec. 142, secs. 54 as amended by statutes of 1887, ch. 37, sec. 17) and by-law 941, sec. 37, in part as follows: "Shall have all public halls, stairways and passageways properly lighted," must be considered only with reference to fire protection and cannot be invoked in case of an accident, not being referable to a fire.

McKinlay v. Mutual Life Assurance Co. (B.C.), 43 D.L.R. 259, [1918] 3 W.W.R. 1002.

REGULATION OF JITNEYS—REASONABLENESS—INJUNCTION—QUASHING.

An injunction refused restraining the defendant city, until after the trial of an action to quash the by-law prohibiting "jitneys" from continuing the prosecution of the plaintiff's drivers for violations of such by-law [Preston v. Luck, 27 Ch. D. 497, applied]. A municipal by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there. [City of Montreal v. Beauvais, 42 Can. S.C.R. 211, at p. 218, quoting Kruse v. Johnson [1898] 2 Q.B. 91, at p. 99, followed.]

Blue Funnel Motor Line v. City of Vancouver (B.C.), [1918] 3 W.W.R. 405.

VILLAGE ACT—POWERS AS TO "BUILDING"—FENCE AROUND PARK AND GRANDSTAND—BY-LAW.

Imperial Elevator & Lumber Co. v. Village of Ponteix (Sask.), 39 D.L.R. 768.

BY-LAW OF COUNTY CORPORATION—HIGHWAY IMPROVEMENT ACT, R.S.O. 1914, CH. 40, SEC. 26—ONTARIO HIGHWAYS ACT, 1915, 5 GEO. V. CH. 17—IMPROVEMENT OF ROADS IN COUNTY—APPOINTMENT OF SUBURBAN AREA COMMISSION—REPORT OR AWARD—ENFORCEMENT OF—ALLEGATION BY CITY CORPORATION OF NON-COMPLIANCE WITH STATUTE—REMEDY—PROHIBITION, INAPPLICABILITY OF EXCEPT IN PLAIN CASE—ACTION FOR INJUNCTION.

Re City of Windsor and County of Essex, 14 O.W.N. 313.

BY-LAW REQUIRING WEIGHING OF COAL OR COKE—POWER OF COUNCIL TO PASS—MUNICIPAL ACT, SEC. 401, CLAUSE 13 (8 GEO. V., CH. 32, SEC. 8 (1)) — "WITH THE APPROVAL OF THE MUNICIPAL BOARD"—APPROVAL GIVEN AFTER PASSING OF BY-LAW—VALIDITY OF BY-LAW.

Re Butterworth and City of Ottawa, 14 O.W.N. 277, affirmed in 15 O.W.N. 143.

REFUSAL OF MAYOR TO SIGN—AGREEMENT—INJUNCTION—RIGHT OF COUNCIL.

Where all the formalities surrounding the passage of a city by-law have been complied with and all that remains to make the document complete and, on its face, a valid by-law is the signature of the mayor, which under the by-laws governing his office he is required to affix, the city is not entitled because his signature is withheld, to an injunction restraining action under an agreement approved by such by-law, where the agreement has been acted upon by the other party to it on the faith of the passage of the by-law. Where an agreement with a city which has been approved of by by-law has been acted upon in good faith by the other party to it, the city council cannot, of its own motion, reconsider the by-law so as to nullify such agreement.

City of Vancouver v. B.C. Elec. R. Co. (B.C.), [1918] 3 W.W.R. 558.

MUNICIPAL COUNCIL—MAYOR—RESIGNATION—SUCCESSOR—VALIDITY OF PROCEEDINGS—ELECTION.

The second part of art. 84, Mun. Code (Que.), which states that "the mayor remains in office, even if he ceases to be a member of the council, until his successor is sworn in," does not apply to a case where the mayor has resigned. It only relates to a mayor who is in office at the period when this office legally expires. A motion adopted by a municipal council upon the casting vote of the person presiding over the meeting is void, if such person had no right to preside. Arts. 314 et seq., Mun. Code, only relate to contestations of municipal elections under arts. 245 et seq., and not those by the municipal council itself. In the latter case the contestations fall under arts. 430 et seq.

Darche v. La Paroisse de St. Mathias, 24 Rev. Leg. 209, 24 Rev. de Jur. 16.

(§ II C—60)—Criminal matter—Dominion statute—Ultra vires.

When the Parliament of Canada in exercise of its power to legislate in regard to criminal matters has prohibited the doing of a certain act, a municipal by-law attempting to prohibit the same act is ultra vires.

Drapeau v. Recorder's Court, 43 D.L.R. 309, 27 Que. K.B. 500, 30 D.L.R. 249, reversing 52 Que. S.C. 505.

Application to quash—Judge.

The judge to whom an application is made under sec. 127 of the city charter of Vancouver, ch. 54, 1913, to quash a by-law is not (per Morrison, J.), is (per Gregory, J.), persona designata.

Chandler v. City of Vancouver (B.C.), [1918] 3 W.W.R. 53. [Affirmed on appeal].

By-law of town—Sanitary requirements—Municipal Act, sec. 500—Portions of by-law exceeding powers of municipality—Distinct and separate clauses—Quashing part of by-law—Costs.

Re Taylor and Town of Port Stanley, 14 O.W.N. 108.

By-law to provide money for erection of high school building—Requisition by board of education—Disapproval by municipal council—Submission to and disapproval by electors—Fresh requisition—Approval by council—Right of council to reconsider—Motion to quash by-law—Requisitions not absolutely identical—High Schools Act, R.S.O. 1914, ch. 268, sec. 38.

Re Garrett and Town of Barrie, 14 O.W.N. 194.

Invalidity of by-law—Bonus to industries—Councillors interested.

A municipal by-law for the purpose of granting a bonus to an industrial undertaking, adopted at a council meeting where the quorum is five members, is illegal and void if two of the councillors who have voted for the measure are personally interested in obtaining such bonus. A by-law adopted under such conditions is ultra vires and may be contested by any municipal elector in his individual capacity.

La Corp. du Village de Daveluyville v. Beaumier, 27 Que. K.B. 23.

Interest of person attacking by-law—Resolution—Remedies — Direct action.

The capacity of citizen, taxpayer, elector and property owner, of the city of Montreal, is not an interest sufficient to entitle him to apply for the rescission of resolutions which do not specially affect him. One having the capacity to do so, can proceed under art. 978, C.C.P., without having recourse to a direct action, which is only taken in the absence of any other remedy. Art. 304 of the Montreal charter, which allows a taxpayer to attack a by-law adopted by the municipal council, does not thereby give him the right to attack a resolution which is simply an act of routine administration. It is not the duty of courts to seek for the motives which might have inspired the acts complained of.

Menard v. La Cité de Montreal, 20 Que. P.R. 31.

Annulment of proceedings—Resolutions—Contract—Form of action—Interest of party.

An application to annul resolutions passed by the municipal council of Montreal, and to void a contract made under such resolutions, should be by action and not by petition. The capacity of taxpayer and elector of the city of Montreal, without special interest distinct from that of such persons collectively, does not permit an application to annul resolutions of the muncipal council or to void a contract made to carry them out.

Rourke v. La Cité de Montreal, 20 Que. P.R. 89.

Validity—Special charter—Amendment—Taxes.

Held, the defendant's by-law No. 35 was duly passed under the provisions of art. 4529 R.S.Q. as amended by 63 Viet. ch. 30 and 3 Ed. VII., ch. 40, which were applicable to the defendant town. The requirements of the said amended art. 4529 have been duly complied with, when the said by-law was voted upon by the proprietors, the valuation of the taxable property in the defendant town, according to the valuation roll then in force, was sufficient to authorize the passing thereof; said by-law has been duly approved by the majority in number and in value of the proprietors who, being municipal electors, have voted thereon, and said by-law has been also approved by the Lieutenant-Governor in Council. Under such circumstances the judgment under review which declared said by-law illegal, null and void, is reversed, and plaintiff's action is dismissed with costs.

Canada Investment v. Town of Scotstown, 24 Rev. de Jur. 129.

(§ II C—70)—Highways — Closing — Powers—Repeal of by-law.

A statute authorizing a municipality, either by carrying out its existing by-laws or any other law, to order the closing or changing any of its public roads, does not inhibit the municipal council, which has passed a by-law ordering the closing of a public road within the municipality, to repeal such by-law. It is not necessary to

submit such a by-law to a vote of the municipal electors under the provision of art. 5782, R.S.Q. 1909.

Drummond v. Town of Beaconsfield, 54 Que. S.C. 85.

REGULATION OF STREETS—RESIDENTIAL PURPOSES — PERMIT FOR GARAGE — CONTRACTOR—COSTS.

The by-law No. 570 of the city of Montreal, to reserve certain portions of streets for residential purpose only, is legal, duly passed and promulgated, and in full force and effect. When a law is doubtful or ambiguous, it is to be interpreted so as to fulfil the intention of the legislative body passing it, and to obtain the object for which it was passed; and every provision of law so adopted shall be deemed to have for its objects the remedying of some evil, and the promotion of some good, and shall receive such fair, large and liberal construction as will insure the attainment of its objects and the carrying out of its provisions according to their true intention, meaning and spirit. Therefore, the by-law, in reserving that part of "Mance street" in question therein, must be construed as meaning and intending the portion of the street now officially known as "Jeanne Mance street," but commonly known as "Mance street." The by-law is a regulation for the good government of the city; and is within the power of the city of Montreal. Where the city or its officers issue a permit to erect an establishment of trade, on a lot fronting on a commercial street, which lot extends to another street in the rear, reserved by law for residences only, the permission does not and could not allow the owner to build a commercial house on this last street. Where a person obtains from the city a permit to erect a garage on a lot, he waives his right, if, subsequently, the city grants him, at his demand, the permission to build, on the same lot, an apartment building. A contractor who represents himself as the owner of a lot, and obtains from the city a permit to build a commercial establishment, and who is sued for having erected this construction on a street reserved for residences only, may have the action dismissed on the ground that he is not the proprietor, but only the contractor; in that case, however, the action will be rejected without costs.

City of Montreal v. Morgan & Co., 54 Que., S.C. 481.

BY-LAW AUTHORISING OCCUPATION OF STREET BY TRAMWAY—AGREEMENT WITH COMPANIES—BY-LAW NOT SUBMITTED TO ELECTORS — MUNICIPAL FRANCHISES ACT, R.S.O. 1914 CH. 197, SEC. 3 (1)—QUASHING BY-LAW — DISCRETION — COSTS—SERVICE OF NOTICE OF MOTION ON COMPANIES.

Re Stinson and Town of Fort Francis, 14 O.W.N. 196.

(§ II C—105)—TRANSIENT TRADERS.

A man carrying goods in a motor-truck and selling them from place to place without localizing his trade in any particular place is a hawker or pedlar and not a "transient trader" within the licensing clauses of the Municipal Act, R.S.O. 1914, ch. 192, sec. 420; and as a hawker he is exempt from the license fee under sec. 416 of that Act if he sells to retail dealers only.

Rex v. Scales and Roberts, 30 Can. Cr. Cas. 82, 41 O.L.R. 229.

PROHIBITING ADVERTISEMENT OF FUNERAL ORNAMENTS—CONSTITUTIONALITY.

A provincial legislature may, without encroaching on the powers of the Dominion Parliament, empower a municipality to prohibit, by by-law, advertisements of funeral ornaments, and to impose fines for the infraction of such by-law and imprisonment in default of the fines. Such by-law does not become unjust and illegal for the reason that incorporated companies transgressing the by-law are exempt from imprisonment.

Belair v. La Cité de Montreal, 19 Que. P. R. 314.

WEIGHT OF BREAD—SCOPE OF REGULATION.

The Act 1 Geo. V., ch. 40, respecting the making and selling of bread, did not effectively abrogate art. 579 of the Mun. Code (old) authorizing municipal councils to "determine the weight and quality of the bread sold or offered for sale in the municipality." It has only limited the field of action of municipal councils by limiting their regulation to provisions which must not conflict with their own.

Bourassa v. Corporation of Parish of St. Barnabe, 53 Que. S.C. 198.

(§ II C—113)—SUNDAY — RESTAURANTS—ULTRA VIRES.

A by-law of a municipal corporation forbidding the opening of restaurants and the sale therein of any merchandise on Sundays is ultra vires, as it deals with the observance of Sunday or the Lord's Day, a matter within the legislative powers of the Dominion Parliament which has been dealt with.

Parish of St. Prosper v. Rodrigue, 40 D.L.R. 30, 56 Can. S.C.R. 157, affirming 37 D.L.R. 321, 26 Que. K.B. 396, which reversed 51 Que. S.C. 109.

BY-LAW RESTRICTING NUMBER OF RESTAURANTS—VALIDITY—HOTEL ACT.

In view of sec. 6 of the Hotel Act, ch. 42, 1917 (as amended by ch. 33, 1918), whereunder a person who has obtained an hotel license is authorized, without further or other license, to conduct a general restaurant or café, and sec. 7 (as amended by ch. 33, 1918), which provides that no person other than licensee under the Act shall operate a restaurant or

café without a license from the municipality in which the same is situate, a town by-law forbidding the carrying on of a restaurant without a license from the town and providing that a licensee shall not conduct more than one place of business under a license, and that not more than one such license shall be granted in any year, does not create a monopoly, and is not otherwise invalid.

Wong Sing v. Town of Minnedosa (Man.), [1918] 3 W.W.R. 181.

(§II C—119)—Prohibition of liquor—Election—Validity.

A municipal elector is sufficiently qualified without proving special interest, to bring action, under the common law, to quash a prohibition by-law, on the ground of fraud, and illegality in the voting of the municipal electors. The provisions of the Municipal Code respecting municipal elections should apply to the voting taken upon the occasion of the adoption or rejection of a by-law for the prohibition of the sale of intoxicating liquors. The public has a right to be present during the voting, and if the presiding officer refuses the electors entrance into the voting room where he remains alone with the secretary-treasurer, the voting upon the by-law will be voided.

Longpré v. Dumoulin, 27 Que. K.B. 155.

D. Contracts generally; ultra vires contracts.

(§ II D—140)—Contract — Resolution—Minutes—Corporate seal.

If a city council has power to contract by resolution, a resolution which is entered on the minutes of the council and sealed with the seal of the corporation is sufficient, and any further sealing is not necessary.

Butler and McLorg v. City of Saskatoon, 38 D.L.R. 480, 11 S.L.R. 1, [1918] 1 W.W. R. 297.

Contract—Action for balance of price of bridge built by plaintiff under sealed agreement with township corporation—Completion of work according to agreement — Executed contract—Payment of part of price—Necessity for by-law—Municipal Act, sec. 249—Use of bridge by municipality—Right of action defeated by absence of by-law.

Witherspoon v. Township of East Williams, 14 O.W.N. 221, reversed in 15 O.W.N. 305.

Imperative provisions as to.

By virtue of sec. 337 of the Montreal city charter, as amended by 3 Geo. V., ch. 54, no contract can bind the city of Montreal unless it has been approved by the council or the board of commissioners, and upon production of a certificate of the controller of finances showing that the city has voted money for such contract. These provisions are imperative, and a claim against the city based on a pretended contract will be rejected, in the absence of proof that the formalities required by the city charter have been fulfilled.

Godin v. La Cité de Montréal, 24 Rev. de Jur. 73.

(§ II D—142)—Contract—Ultra vires—Breach—Damages.

If a municipal corporation, apparently in the due exercise of its powers, enters into a contract, but by reason of the non-fulfilment of some statutory duty imposed on it in connection therewith, such contract is declared to be ultra vires, the corporation is liable in damages for breach of such duty. A municipal corporation having made a contract imposing an obligation on such corporation must provide sufficient means to fulfil such obligation. [See annotation, 36 D.L.R. 107.]

Quinlan & Robertson v. Town of St. John, 41 D.L.R. 365, 24 Rev. de Jur. 321.

E. Borrowing money; indebtedness.

(§ II E—152)—Money by-law — Publication.

The provisions of sec. 263 of the Municipal Act, R.S.O. 1914, ch. 192, are imperative, and failure to publish a by-law, which requires the assent of the electors, in the village if there is a newspaper published there, is a disregard of the principles of the Act and the defect or irregularity is not cured by the saving provisions of sec. 150.

Re Poulin and Village of L'Orignal, 42 D.L.R. 681, 42 O.L.R. 483, reversing 42 O.L.R.6.

Money by-law—Validity—Submission to electors — "Ratepayers" — Agreement for purchase of power plant.

Re Campbell and Town of Rainy River, 15 O.W.N. 63.

F. As to lights, water supply and other property and privilege.

(§II F—170)—Electric company—Lighting system—By-law — Repeal — Injunction.

A municipal corporation may proceed by injunction against an electric company attempting to instal within the municipality a system of electric lighting, under a by-law which is subsequently repealed and replaced by another because the first was illegal, and neither the company nor its grantors had done anything to take advantage of the privileges granted by the repealed by-law. The right of the corporation to an injunction is more evident, because the by-law was not attacked as illegal. As long as the second by-law remains in force the first must be without effect.

La Ville des Trois-Pistoles v. La Compagnie Electrique des Trois-Pistoles, 24 Rev. de Jur. 178.

LIGHTING COMPANY—POLES—PRIVATE PROPERTY—NECESSITY.

Although art. 5674, R.S.Q., requires the owners "of houses or lands in cities and towns to permit the pipes, lamps and posts necessary for the lighting for public purposes to be placed on their houses, buildings or lands," a lighting company can only avail itself of this provision to place a pole upon private property without expropriation, by showing an absolute necessity of so acting, and subject to using the privilege only for lighting purposes.

North Shore Power Co. v. Lebel, 27 Que. K.B. 294.

STREET LIGHTING — CONTRACT—BREACH — THIRD PERSON—VERDICT.

An action for damages cannot be based upon a violation of the obligations of a contract to which the plaintiff is not a party and to which he is a stranger. 2. A verdict based upon acts of negligence not alleged in the declaration cannot be received. 3. The city of Montreal cannot be held responsible for an accident because it had not sufficiently kept watch over a contract which it had made with the Montreal Light, Heat & Power Co. for lighting its streets, and had not seen that the company's lights in the streets did not go out during the night.

Desautels v. Montreal Light & Power Co. and City of Montreal, 53 Que. S.C. 73.

(§ II F—174) — GAS FRANCHISES — EXCLUSIVE GRANT—TERRITORIAL LIMIT.

Agreements for supplying gas "throughout" a city, and regulating the prices chargeable to the "inhabitants of the city," are not limited to the city as it was when the agreements were entered into, but are applicable to all extensions of the city subsequently made; a reference in the agreement to the exclusive rights and privileges granted and a provision that "the city shall not grant similar privileges to any person, firm or corporation" are not exclusive as against the city itself.

City of Calgary v. Canadian Western Natural Gas Co., 40 D.L.R. 201, 56 Can. S.C.R. 117, [1918] 1 W.W.R. 121, affirming 33 D.L.R. 385, 10 A.L.R. 180, which reversed 25 D.L.R. 807.

(§ II F—180) — "CREMATORIES" — "INCINERATORS."

The provisions of sec. 232 of the City Act (Sask. Stats. 1915, ch. 16) relating to crematories, do not apply to incinerators, which are entirely different things.

Butler and McLorg v. City of Saskatoon, 38 D.L.R. 480, 11 S.L.R. 1, [1918] 1 W.W.R. 297.

WATER COURSE—DITCH—APPEAL—JURISDICTION—IRREGULARITY.

Municipal council having jurisdiction to establish a water course, may utilize, for this purpose, either a line ditch or a road ditch already existing. 2. Art. 867 of Municipal Code (old) by which road ditches and line ditches appear to be excepted from the category of municipal water courses, ought to apply to such ditches only as long as they do not alter their nature. 3. Art. 100 of Municipal Code (old) does not give an appeal to the parties upon questions of fact; it can only be invoked in cases where a municipal council has exceeded its authority, or has committed a grave irregularity or has rendered itself guilty of a grave injustice.

Bélanger v. La Corporation de la Paroisse de St. Barnabé, 53 Que. S.C. 255.

G. LIABILITY FOR DAMAGES.

(§II G—195)—STREETS—CLOSING—INJURY TO ADJOINING PROPERTY—EXCAVATION—RETAINING WALL—COMPENSATION.

The plaintiff's land held to have been affected injuriously by the closing of a lane and compensation awarded him [Randall v. Calgary, 9 W.W.R. 1508, distinguished]. A claim for compensation, on the ground that the excavation of a street will render necessary the construction of a retaining wall to prevent the soil of the lot from falling into the highway, disallowed, following Forster v. Medicine Hat, 17 D. L.R. 391, 6 W.W.R. 548.

Stringer v. City of Edmonton (Alta.), [1918] 2 W.W.R. 436.

CLOSING OF STREET — TRAFFIC—TRADE — DAMAGES.

The city of Montreal has the power in the public interest to prohibit the passage of vehicles in certain streets; but if an individual sustains damages in his trade, the city must indemnify him for the injury it causes him.

Cogne v. La Cité de Montréal, 24 Rev. Leg. 238.

PUBLIC WORKS—NEGLIGENCE — DAMAGES — LOSS OF PROFIT—PRESCRIPTION.

The city of Montreal is responsible for damages sustained by the owner of a place of business situated 1,000 feet from a place where it was carrying on public works, if it has been negligent in delaying such works unreasonably and unjustly. The diminution of profits sustained by such owner in his trade and undertakings, shewn by a comparison of his business during the year the works were in progress with that of the preceding year, as well as by contracts in hand, is not indirect damage or too remote under arts. 1074 and 1075 of C.C. (Que.), and should be allowed in accordance with the evidence in the action. The 6 months prescription, mentioned in art. 537 of the Montreal charter, against damage actions resulting from offences, quasi-offences, or irregularities, is not a denial of the right of action as in art. 536a of the same act; therefore the court cannot of its own motion apply such prescription under art. 2188 C.C. (Que.).

Dambrosio v. City of Montreal, 54 Que. S.C. 65.

PUBLIC WORKS—NEGLIGENCE—NOTICE OF ACTION.

The city of Montreal is responsible for damages it caused even in making necessary public streets authorized by law and undertaken in the public interest, when guilty of negligence in the execution of such works. Actions for damages so caused are not governed by art. 536 of its charter, relating to notice of action to which it is entitled.

Newman v. City of Montreal, 53 Que. S.C. 481.

(§ II G—210) — NEGLIGENCE OF POLICE CHAUFFEUR — LIABILITY OF CITY OR POLICE COMMISSION—DISCOVERY.

In an action against the city of Winnipeg for damages by the widow and children of a man who had been struck and killed by a police ambulance, held, that as the plaintiffs were entitled to interrogate the city as to matters the answers to which might assist them in proving that the city owned and controlled the ambulance but were not entitled to administer interrogatories which would oblige the city to obtain and supply information in the exclusive possession of the board of Police commissioners, whom the city denied to be its agents. [Wishart v. Borden, 4 Man. L.R. 453 referred to.]

Bowles v. City of Winnipeg (Man.), [1918] 2 W.W.R. 529.

ILLEGAL ARREST—CONSTABLE—PUBLIC OFFICER—NOTICE OF ACTION.

A constable of the city of Montreal who arrests in a public street a person on a charge of having committed a theft, does not act as an employee and officer of the city, but must be considered as a peace agent in the service of the state, and therefore the city of Montreal is not responsible for his conduct. 2. The constables of the city of Montreal are public officers, and, in such quality, they cannot be sued for damages by reason of an act done by them in the exercise of their functions without notice of action of at least one month before the issue of the writ of summons, in conformity with art. 88 C.C.P. 3. The court is bound to take notice of such want of notice, although it has not been raised as a part of the defence.

Gratton v. City of Montreal, 53 Que. S.C. 259.

(§ II G—217)—BOARD OF COMMISSIONERS—NEGLIGENCE OF ENGINEER.

A member of a municipal council or board of commissioners which has directed work to be done by its engineer, who from curiosity or from any other motive is present when the work is being done, and is injured owing to the negligence or want of skill of the engineer, may recover from the corporation damages for the injuries sustained.

Mahoney v. City of Guelph, 43 D.L.R. 490, 43 O.L.R. 313, reversing 41 D.L.R. 60, 41 O.L.R. 308.

(§ II G—222) — HIGHWAYS — REASONABLE SAFETY

A municipal corporation is not an insurer of travellers using its streets; its duty is to use reasonable care to keep its streets in a reasonably safe condition for ordinary travel by persons exercising ordinary care for their own safety.

Fafard v. City of Quebec, 39 D.L.R. 717, 55 Can. S.C.R. 615, affirming 35 D.L.R. 661, 26 Que. K.B. 139; 50 Que. S.C. 226.

(§ II G—235)—EXCAVATION — FOREMAN—NEGLIGENCE.

An error of judgment is not an inexcusable fault; consequently a municipality in Quebec is not liable for the death of a workman employed on a road through the caving in of an unshored excavation after the foreman has decided that shoring is not necessary.

Audet v. City of Sherbrooke, 39 D.L.R. 306, 24 Rev. Leg. 117.

INJURY TO BUILDING IN TOWN BY WATER FLOWING INTO ALLEY—CAUSE OF FLOW OF WATER—CONSTRUCTION OF PAVEMENTS AND OF BUILDINGS ADJOINING ALLEY—EXCAVATION MADE IN SOIL OF STREET BY OWNER OF INJURED BUILDING.

Holland v. Town of Walkerville, 15 O.W.N. 268.

DRAINS AND SEWERS—CLAIM FOR FLOODING OF PREMISES—FAILURE TO PROVE THAT FLOOD CAME FROM MUNICIPAL SEWER—FOUNDATION OF LIABILITY—SEWER BECOMING INADEQUATE BY REASON OF GROWTH OF CITY—DAMAGES—REMOTENESS.

Crompton Corset Co. v. City of Toronto, 14 O.W.N. 197, 15 O.W.N. 87.

DRAINAGE—CELLAR OF HOUSE CONNECTED WITH MUNICIPAL DRAINS—INJURY BY FLOODING—DEFECTIVE SYSTEM—ACTION FOR DAMAGES—FINDING OF JURY—JURISDICTION — STATUTORY REMEDY — MUNICIPAL DRAINAGE ACT—MUNICIPAL ACT—LOCAL IMPROVEMENT ACT—QUESTION NOT RAISED BEFORE APPELLATE COURT WHICH DIRECTED TRIAL OF ACTION.

Manie v. Town of Ford, 14 O.W.N. 83, affirmed in 15 O.W.N. 27.

DRAINAGE—UNLAWFUL INTERFERENCE WITH NATURAL WATERCOURSE — FLOODING PLAINTIFF'S PREMISES — CAUSE OF FLOODING—INFERENCE OF FACT—FINDING OF TRIAL JUDGE—UNDERTAKING TO REMEDY DIFFICULTY BY NEW DRAIN—DAMAGES.

Jeffries v. City of Toronto, 14 O.W.N. 220.

DEEPENING OF DITCH—CREATION OF OUTLET —INJURY TO PLAINTIFF'S LAND BY OVERFLOW OF WATER—NEGLIGENCE—AWARD UNDER DITCHES AND WATERCOURSES ACT, R.S.O. 1914, CH. 260—APPLICATION OF SEC. 23—DAMAGES FOR INJURY TO CROPS—ASSESSMENT OF — INJUNCTION—LEAVE TO APPLY IF CAUSE OF COMPLAINT NOT REMOVED—COSTS.

Rynd v. Township of Blanshard, 15 O.W. N. 150, affirmed in 15 O.W.N. 406.

PLANT FOR DISPOSAL OF SEWAGE—ERECTION AND OPERATION—NEGLIGENCE IN OPERATION—NUISANCE TO NEIGHBOURS—OFFENSIVE ODORS — SPECIAL DAMAGE — STATUTORY AUTHORITY — MUNICIPAL ACT, SEC. 398 (7)—ABSENCE OF BY-LAW —FAILURE TO OBTAIN APPROVAL OF BOARD OF HEALTH—PUBLIC HEALTH ACT, SEC. 94 (1).

Fieldhouse v. City of Toronto, 44 D.L.R. 392, 43 O.L.R. 491, 15 O.W.N. 57.

BURSTING OF WATER MAIN—FLOODING OF BASEMENT.

Where damages are caused by inanimate things, a legal presumption exists as to the fault of the proprietor or guardian thereof. Therefore, the city of Montreal is responsible for the damages caused by the inundation of the basement of a house, through the cracking of a water main pipe, the property and under the care of the municipality.

Delahanty v. City of Montreal, 54 Que. S.C. 50.

CHANGE OF WATER COURSE—EXPROPRIATION.

A municipal corporation has no right, except in cases provided by law, to change, by minutes of proceedings, the natural direction of a water course in such a way as to cause it to flow over lands which nature has not subjected to such servitude. (By Belleau, J.) A municipal corporation can only order the expropriation of land in order to secure the carrying out of its minutes, when the works ordered are of general public interest, but not when they only concern a few taxpayers.

Cloutier v. La Corporation de Notre Dame-du-bon-Conseil, 53 Que. S.C. 128.

(§II G—260)—NOTICE OF ACTION—CITIES AND TOWNS ACT—ESSENTIALS—LOSS BY FIRE.

Art. 5864 of the Cities and Towns Act, reproduced in the defendant's charter, as amended by 2 Geo. V., ch. 59, requires that before instituting an action for damages for personal injuries, or for damages to movable or immovable property, written notice be given to the city clerk within 60 days from the date on which the right of action accrued of the claimant's intention to sue, the details of the claim, and the place where he resides; in default whereof the defendant is not bound to pay damages, notwithstanding any provision of law to the contrary. That provision makes the notice which it requires previous to service of the summons an essential formality, the omission of which entails the nullity of the action. Knowledge which the defendant might have of the accident, or of damages to movable or immovable property, does not dispense with the notice. Service on the defendant of a simple deed of quittance and subrogation of the rights, remedies and claims of the victim of the accident, or damages to the property, does not free the assignee of the obligation to give the notice. The notice must be written, previous to the action; it must particularize, within the delay fixed, the nature, character and amount of damages; the place where the damages were sustained; the date—if not exact, at least approximate—at which they occurred; the intention to sue; the residence of the claimant; all the facts and circumstances which bring about the liability of the defendant. An omission of the notice does not give rise to a preliminary exception to form; while the 4 months prescription enacted by the same provision always produces a peremptory exception of the action. The losses caused by a fire constitute damages to movable and immovable property of the same nature as those intended by art. 5864.

Strathcona Fire Ins. Co. v. La Cité de Sorel, 24 Rev. de Jur. 609.

NOTICE OF ACTION—HIGHWAY—LOSS OF HORSE.

A claim, with threats to refer it to an advocate, addressed to the mayor of a municipality after a road accident, is equivalent to the notice of action required by art. 453, Mun. Code, if it is established that such claim has been communicated to council. In the present case the court held that a claim for $75 can take the place of a notice of action preliminary to an action for $125. A municipal corporation is responsible for the loss of a horse which fell and broke a foot, after having slipped on a stone sticking out of the roadway, unless it is shown that the stone was there by a mere accident, or force majeure.

Gaudreau v. La Corporation de la Paroisse de Beauport, 54 Que. S.C. 23.

NOTICE OF ACTION—WORKMEN'S COMPENSATION ACT—PRESCRIPTION.

Secs. 536, 536a and 536b of the charter of the city of Montreal, which relate to the notice to be given to it in the case of actions for damages, to the 6 months prescription for such actions, and to the city's recourse in warranty having as their object actions based on liability for offences or quasi offences, do not apply to actions brought under the Workmen's Compensation Act, which are based on a legal and contractual obligation.

Robin v. City of Montreal, 54 Que. S.C. 2.

H. AS TO TAXES.

See Taxes.

(§II H—265)—MUNICIPAL VALUATION — LAND IN CULTIVATION—JURISDICTION—SUPERIOR COURT.

The Superior Court has jurisdiction in an action to declare illegal a municipal valuation of real estate by assessors of the city of Montreal when the object of the action is, not only to reduce the entry on the valuation roll, but also to declare that the principle of the valuation is erroneous, as in the case where the municipal assessors have disregarded the owner's right to have his real estate valued as land under cultivation and have assessed it as building lots.

Laberge v. City of Montreal, 27 Que. K.B. 1.

VALUATION ROLL—AGRICULTURAL LAND AND CITY PROPERTY—APPEAL.

Although the Cities and Towns Act restricts to the lowest rate the tax which corporations can levy upon agricultural lands situated within the limits of their municipalities, the omission to state in the valuation roll any reference to distinguish agricultural lands from city property is not a reason for voiding the roll. It is at the time of the making up of the collector's roll that interested taxpayers ought to appeal if their properties are taxed in excess of the rate fixed by law.

Delisle v. La Ville de Roberval, 54 Que. S.C. 103.

VALUATION OF LAND—ANNEXATION—AGREEMENT—REVIEW.

Where there was an agreement, confirmed by law, between the city of Montreal and a neighboring municipality, that after the annexation of the latter the land under cultivation in the muncipality shall not be valued at more than $100 an arpent, and later the city's assessors valued one piece of land much higher, the court of revision has power to set aside such valuation and give effect to the agreement between the two municipalities, at the suit of the owner of the land.

Cité de Montréal v. Décarie, 24 Rev. Leg. 241.

(§ II H—267)—EXEMPTION FROM TAXATION.

A municipal exemption from "taxes or any other dues to the said city" includes not only municipal taxes but likewise school taxes and the special tax for sidewalks.

City of Montreal v. Garneau, 54 Que. S.C. 520.

(§ II H—271)—TAX SALES UNDER SUMMARY PROCEEDINGS.

Although sales of immovables by the sheriff for municipal assessments, due to the City of Montreal, are made under the summary proceedings provided by the charter, and appointed for October 15 in each year, nevertheless, when a first opposition to such sale was only decided by the court subsequently to October 15, the city may continue summary proceedings for the sale of the immovables even on a date other than October 15, under art. 401 of the charter and art. 733, C.C.P.

La Cité de Montréal v. Tritt, 24 Rev. de Jur. 197.

(§ II H—275)—WHAT TAXABLE—CITY PROPERTY—HOMOLOGATED LINE.

A ratepayer who, after the formalities of the charter have been complied with by the City of Montreal in imposing a tax, does not complain within the delays and in the manner prescribed by the charter, is debarred from afterwards complaining, except if in imposing such tax the city exceeded its power, in which case such imposition would have no legal authority and be absolutely null and void; and a taxpayer would not be deprived of the right to invoke, before the court, that illegality and nullity, even after the roll had come into force. A house situated on a residential street, built upon and occupied, bounded in front by an homologated line, upon which strip of reserved ground are shade trees, lawn, flowers and a well covered by a structure, is considered as one single property, and the portion within the homologated line can be assessed by the City of Montreal together with the rest of the property.

City of Montreal v. Smith, 54 Que. S.C. 124.

SPECIAL TAX—PUBLIC ROADS—ISLAND.

Municipal corporations have a right to levy a special tax upon all taxable real property situated within their territory, for the improvement of their public roads, and the fact that a portion of the real property is on an island, where there are no roads, does not exempt it from the tax.

Choquette v. La Paroisse de Varennes, 54 Que. S.C. 33.

III. Powers of officers.

(§ III—286)—MAYOR — COUNCIL — CONTRACT—RATIFICATION.

The plaintiff, an accountant, was instructed by the Mayor of Toronto by letter to examine the books of the Toronto Electric Light Company "and give me a report of the company as an accountant shewing the probable financial results if the city takes over the company's business and operates at the present load of about 30,000 h.p." These instructions were afterwards extended to include also the Toronto Railway Company. No sum was agreed upon as remuneration. The negotiations for purchase having failed, the plaintiff sent in a bill for $42,546.50 which the council refused to pay, and the plaintiff then brought action to recover this sum. The court held that there was no executed contract in the sense that the council, knowing the facts, had accepted or ratified the act of the Mayor, such ratification would have to be by by-

law, upon full knowledge of the facts. The plaintiff had misconceived the nature of the work required to be done and could not recover. [Waterous Engine Works Co. v. Town of Palmerston (1892), 21 Can. S.C.R. 556, followed; Pim v. Municipal Council of Ontario (1855), 9 U.C.C.P. 304, distinguished.]

Mackay v. City of Toronto, 43 D.L.R. 263, 43 O.L.R. 17, affirming 39 O.L.R. 34.

MURDER.

See Homicide; Criminal Law.

MUTUAL BENEFIT SOCIETIES.

See Benevolent Societies.
Benefit certificates, see Insurance.

NAME.

See Trade-mark; Trade-name; Companies.

NATURALIZATION.

See Aliens.

Annotation.

How affected by war as against rights of alien enemies: 23 D.L.R. 375, 383.

NAVIGABLE WATERS.

See Waters.

NAVIGATION.

See Waters; Collision; Shipping.

NEGLIGENCE.

I. As basis of action.
A. General rules.
B. Dangerous agencies.
C. Dangerous premises.
D. On highways or waters.
II. Contributory.
A. Generally.
B. Of persons under disability.
C. On highways.
D. Other cases.
E. Imputed.
F. Injury avoidable notwithstanding contributory negligence; last clear chance.

Annotations.

Contributory negligence of children injured on highways through negligent driving: 9 D.L.R. 522.

Contributory negligence; navigation; collision of vessels: 11 D.L.R. 95.

Defective premises; liability of owner or occupant; invitee, licensee or trespasser: 6 D.L.R. 76.

Duty to licensees and trespassers; obligation of owner or occupier: 1 D.L.R. 240.

"Negligence or wilful act or omission" within meaning of Railway Act: 32 D.L.R. 397; 33 D.L.R. 423; 35 D.L.R. 481.

Ultimate negligence: 40 D.L.R. 103.

Sufficiency of evidence of negligence to go to jury. 39 D.L.R. 615.

I. As basis of action.

A. General rules.

Negligence of municipality, see Municipal Corporations; Highways; Bridges.

In construction and operation of railways, see Railways; Street Railways; Carriers; Master and Servant.

(§ I A—1)—Presumption of fault—How rebutted—Recourse.

The presumption of fault created by art. 1054 against the owner of the thing which causes an accident resulting in injury can only be refuted by proof of force majeure, fortuitous event, or the victim's fault. It is not sufficient for the owner to prove that the thing was in good condition. When there are several plaintiffs in an action for damages, and only some of them succeed in obtaining them, the defendant has on that ground no right to damages against the others.

Fortin v. Montreal Tramways Co., 54 Que. S.C. 428.

B. Dangerous agencies.

(§ I B—5)—School—Examination—Dangerous equipment.

A School Board which conducts a technical school for instruction in the manual arts, and permits the Department of Education to use its equipment on an examination, the examination being entirely under the direction of the Department of Education, is not liable in damages for injuries to a student taking the examination, if the equipment supplied was reasonably safe and suitable for the work for which it was being used.

Smiles v. Edmonton School District (Alta.), 43 D.L.R. 171, [1918] 3 W.W.R. 673, reversing 41 D.L.R. 400, [1918] 2 W.W.R. 586.

Railways—Contractor—Sand deposits — Expropriation.

Damages suffered by a landowner from sand deposits in the course of construction of a Crown railway are only recoverable as against the contractors; the injury not having resulted from any expropriation of land is not actionable against the Crown under the Expropriation Act, and having happened 10 acres away from the railway, was not "on a public work" within the meaning of sec. 20 of the Exchequer Court Act, and therefore not actionable against the Crown under the latter statute.

Theberge v. the King, 41 D.L.R. 282, 17 Can. Ex. 381.

Railway—Engine without lights.

A railway company which permits the public to habitually use its track as a short cut, knowing it to be so used, is guilty of negligence, if without giving the public warning it runs an engine, without lights and with a defective whistle, over the track on an extra trip, on a dark and windy

night. [Lowery v. Walker, [1911] A.C. 10, followed.]

Herdman v. Maritime Coal, Railway and Power Co. (N.S.), 40 D.L.R. 96, annotated.

RAILWAY—DEFECTIVE BRIDGE—BODY FOUND IN RIVER—EVIDENCE—SUFFICIENCY.

In an action for damages for the benefit of the wife and children of a passenger on the defendant's railway whose death was alleged to have resulted from the negligence of the defendant's servants, it appeared that, owing to a defective bridge, the passengers on the train on which the deceased was travelling were obliged to walk across part of the bridge and board another train. When the train arrived at the bridge the deceased was intoxicated and asleep. The conductor of the train was aware of the deceased's condition and, apparently thinking that he could not be got conveniently across the bridge, decided to leave him in the train so that he would be taken back on it, and proceeded eastward. The train in which the deceased had been left did not start back for some time afterwards, and while, before it did so, he had been noticed by passengers to be on it and asleep, he could not be found when it left. While the train was standing, one of the passengers had heard a splash of a heavy body of some kind falling into the water below the bridge. Three weeks afterwards the deceased's body was discovered in the river a point about twelve miles below the bridge. The face bore a severe bruise which, according to the testimony of the coroner and the undertaker, must have been made before death, but there was no other mark of violence upon the body. At the trial before Harvey, J., a motion for a non-suit was allowed, and the trial judgment was affirmed on appeal, Stuart, J., dissenting. On the appeal to the Supreme Court of Canada, Davies, J., Girouard and Anglin, J.J., concurring, held that there was evidence from which it would be open to a jury to find that the deceased came to his death as a result of the defendant's negligence, and the case was remitted for a new trial, Fitzpatrick, C.J., and Idington, J., dissenting.

Beck v. C.N.R. Co., 13 A.L.R. 177.

BOARD OF HEALTH—INFECTIOUS DISEASE.

An action under the Fatal Accidents Act for damages for the death of an infant suffering from a communicable disease will be dismissed where there is no evidence to show that the death was caused by the negligence of the authorities in charge, despite the verdict of a jury in favor of the plaintiff. [Reed v. Ellis, 32 D.L.R. 592, referred to.]

Simpson v. Local Board of Health of Belleville, 39 D.L.R. 442, 40 O.L.R. 406; 13 O.W.N. 64, affirming 12 O.W.N. 241.

HIGHWAY — FIRE—STEAM ENGINES — PRESUMPTION.

One who uses vehicles and steam rollers for macadamizing a public road, without providing appliances protecting against fire, is responsible for the loss of buildings destroyed as the result of a fire started by sparks coming from such machines. Where an inhabited house and outbuildings built in an isolated place along a public road are burned ten minutes after the passage of a steam engine, from which sparks escaped, the accident, if no other cause is established, will be attributed to such sparks.

Pelletier v. Stack, 54 Que. S.C. 148.

(§ I B—9)—EXPLOSIVE ON ROAD—INJURY TO CHILD—QUESTIONS TO JURY—FINDING—FINALITY.

In an action to recover damages for injury to an infant caused by an explosive stick which he said he found in a tool box left unlocked on the roadside by the defendants, the jury in answer to questions submitted to them, found: (1) that the infant plaintiff obtained the explosive which injured him from the defendants' box; (2a) that the defendants "may not have known" it was there; (2b) that the defendants ought, by the exercise of reasonable care, to have known that it was there; (3) that the explosive was in the possession of the defendants when the infant plaintiff obtained possession of it; (4) that the defendants were guilty of negligence in their care of the explosive; (5) that the negligence consisted in not locking their tool-box; (6) that the defendants' negligence caused or contributed to the accident; (7) that the infant plaintiff was not guilty of any negligence which caused or contributed to the accident:—The court held that the main question, whether the boy had obtained the explosive from the defendants' tool-box, was a question for the jury, their finding could not be disturbed, and that judgment was properly entered for the plaintiff on the findings.

Gerard v. Ottawa Gas Co., 43 D.L.R. 447, 43 O.L.R. 264.

INJURY TO PERSON BY MACHINE-GUN—SHELL EXPLODED BY TRESPASSER—GUN USED AT FAIR GROUNDS IN CHARGE OF MILITARY OFFICER—COMMITTEE OF CITIZENS PROCURING DISPLAY OF GUN TO AID RECRUITING — LIABILITY FOR INJURY — FINDINGS OF FACT OF TRIAL JUDGE—DAMAGES — SUGGESTED CASE FOR COMPENSATION OUT OF PUBLIC MONEY.

Le Groulx v. Kerr, 14 O.W.N. 140.

(§ I B—15)—LIABILITY OF MANUFACTURER—BOWLING ALLEYS—DRY ROT.

A manufacturer of bowling alleys who agrees to superintend their installation is liable in damages for neglect to provide sufficient ventilation to protect against dry rot.

Smith v. Brunswick Balke Collender Co., 38 D.L.R. 455, 25 B.C.R. 37.

TIMBER—LIABILITY FOR CONTRACTOR'S ACTS.

The purchase of rights to cut the timber implies, for the purchaser, the right to use the ground for the purpose of operating the lumber business; but it includes also the consequent obligation of using it as a good "pater familias." The purchaser cannot divest himself of such obligation by asking contractors to run the business at a fixed price; owing to his personal obligation he remains responsible for depredations committed on the premises by such contractors in carrying out their contract.

Giguère v. Tobin Mfg. Co. 53 Que. S.C. 193.

DEFECTIVE MACHINE—LIABILITY OF OWNER.

The owner of defective machinery is responsible for damages caused by it to a workman who is engaged on it.

Montreal Ammunition Co. v. Parent, 27 Que. K.B. 558.

C. DANGEROUS PREMISES.

(§ I C—35)—FACTORIES ACT — BREACH — GRAIN ELEVATOR—DEATH OF EMPLOYEE.

A drum around which coil the steel cables attached to a lift, and a hole between the drum and the side of the platform on top of which the lift is placed, are within subsecs. (a) and (e) of sec. 19 of the Factories Act, R.S.S. 1909, ch. 17, and are, therefore, things which should be guarded and protected; and where, because of the absence of such a guard, an employee of the proprietor of the factory wherein such lift is meets his death such proprietor is liable in damages to the dependents of the deceased.

Hilton v. Robin Hood Mills, 11 S.L.R. 370, [1918] 3 W.W.R. 168.

SAW-MILL — DAMAGES — POSSESSORY OR NEGATORY ACTION—OCCUPANT—BEACH.

Although it may be true, in principle, that if a person establishes himself at a place where an industry is in operation, and that the owner of the latter uses all possible and necessary improvements to diminish the inconvenience of his proximity and the damages which he may cause, he must suffer them without being able to claim any compensation, it is otherwise if the industry has rendered itself guilty of negligence in the operation of its works. Accordingly, the owner of a saw-mill is liable for damages, caused to his neighbor by allowing the wind to carry over the latter's land bark and sawdust from works carried on in his mill, without taking any precautions to prevent them. The owner of the mill is, in fact, exercising a servitude upon the land of his neighbor, who may bring a negatory action against him. An occupant, by permission of the Crown, of beaches, of public domain, has a right to a possessory action of servitude, if he is disturbed by his neighbor.

Cimon v. Bouchard, 24 Rev. Leg. 449.

(§ I C—44)—FALL OF FROZEN SURFACE OF GRAVEL PIT — CONTRACT—BREACH OF DUTY—CAUSE OF DEATH—CONTRIBUTORY NEGLIGENCE—FATAL ACCIDENTS ACT—PARENTS—DAMAGES.

The defendants employed a teamster to take gravel for them from a pit, at so much a load; they had agreed both with the owner of the pit and with the teamster to remove the surface earth and snow from the pit in order that the gravel might be reached and got out. The defendants failed to perform that duty properly, and the plaintiff's son, who was employed by the teamster, went into the pit, on a day in winter, to load and draw gravel from it, and was killed by a piece of the overhanging surface of frozen earth and snow falling upon him. On the previous day, a servant of the defendants, in or towards the performance of their duty to remove the surface, had exploded three charges of dynamite in the frozen surface soil so as to loosen it and remove it. No examination was, on that day or the next day, made to ascertain the full effect of the explosion; and yet the man who was killed was ordered, by the defendants' same servant, to load the gravel at the part of the pit where the explosion had taken place:—Held, that the defendants' failure to perform their duty was the cause of the man's death, and that they were liable in an action under the Fatal Accidents Act. In the circumstances, there was a duty upon the defendants toward every one there, as the man was employed in removing gravel for the defendants, to take reasonable care that the frozen surface was so removed that it should not be a needless danger to them when so employed. The defendants had committed a breach of duty, apart from contract. Held, also, that the defendants were liable upon another ground, viz., the neglect of their servant in regard to the explosion, that neglect having been the direct cause of the death. The deceased was not the author of his own injury, nor was he guilty of contributory negligence. The amount assessed as damages by the trial judge, $1,400, divided between the father and mother of the deceased, was not excessive in view of the evidence of reasonable expectation of pecuniary benefit from the prolongation of the life of their son. Judgment of Kelly, J., affirmed.

Durant v. Ontario and Minnesota Power Co., 41 O.L.R. 130.

(§ I C—48)—CARRIERS—WAGGON ON WHARF —INJURY TO CHILDREN.

Carriers are guilty of negligence in placing a crated waggon on a public wharf in too perpendicular a position, so that children lawfully on the wharf pull it over and are injured. The selection by the wharfinger of the place of deposit does not make him liable for the negligence of the carriers' servants.

Clement v. Northern Navigation Co., 43 D.L.R. 433, 43 O.L.R. 127, reversing 13 O. W.N. 22.

WHARF—GANGWAY.

The lessee of a building on a wharf, occupied as a freight shed, is not responsible for an accident which happened to a laborer who was working in it, by the fall of a heavy gangway belonging to the lessee, which stood against a post in a slanting position and was knocked down by a carter unloading his cart; the fact that the lessee failed to have the gangway attached to the post so that it could not fall was not considered as negligence.

Cantillon v. C.P.R. Co., 53 Que. S.C. 179.

(§ I C—49)—CANAL—OPEN BRIDGE—AUTOMOBILE—RECKLESS DRIVING.

The suppliant, in the course of a joy-ride, driving an automobile without a chauffeur's license, attempted to cross a Government canal bridge when the bridge was being opened and the gates down, after being signalled to that effect by the bridge-master, resulting in the machine and its occupants plunging into the canal. Held, under the circumstances and evidence, the suppliant has made out no case against the Crown, and that the accident was brought about by his own negligence.

Boyer v. the King, 42 D.L.R. 384, 18 Can. Ex. 154.

(§ I C—49)—DRAWBRIDGE—AUTOMOBILE — NEGLIGENCE OF DRIVER—PASSENGER.

A corporation which, by the situation of a drawbridge, the approach thereto, and a flimsy barrier across the bridge when open, makes such bridge a trap for the unwary and an invitation to accident, is liable for damages, due to a jitney breaking through the barrier and plunging into the river, notwithstanding that the highway was known to the driver, and that he was reckless and disregarded the danger. The negligence of the driver was not chargeable to a passenger in the car so as to prevent recovery, although if the action had been brought by the representatives of the driver the question of contributory negligence would have arisen.

Evans v. Corp. of Richmond (B.C.), 43 D.L.R. 214, [1918] 3 W.W.R. 487.

(§ I C—50)—DUTY TO LICENSEE—BARBED WIRE FENCE.

A person using a trail over private property, and over which the public has acquired no right of way, is a bare licensee, and the only duty of the owner of the premises towards him is to give him warning of any concealed danger or trap of which the owner knows; the construction of a barbed wire fence along the boundary of the land is not in the nature of a trap.

Robinson v. Dodge, 39 D.L.R. 679, 28 Man. L.R. 533, [1918] 1 W.W.R. 812.

BOY INJURED IN GYMNASIUM—TRESPASSER OR LICENSEE.

In an action for damages for personal injuries sustained by a boy in falling from an elevated running track in the defendant's gymnasium, held that, even on the assumption that the boy had a right to be on the track, there was no evidence that the defendant had failed in any duty owed by it to him (per Harvey, C.J., Beck and Hyndman, J.J., concurring). Stuart, J., was of the opinion that, since the boy was present in the gymnasium at the time of the accident, contrary to the rules of the defendant association and without an invitation from its officials, he was a trespasser or, at the most, a licensee, and the association had not failed in any duty owing to him in either capacity. [Latham v. Johnson, [1913] 1 K.B. 398, applied.]

McLean v. Young Men's Christian Association (Alta.), [1918] 3 W.W.R. 522.

D. ON HIGHWAYS OR WATERS.

See Shipping; Collision; Automobiles.

(§ I D—70)—PUBLIC THOROUGHFARE—SIDEWALK—REPAIR.

A part of a public thoroughfare which a municipality allows the public to use as a footpath, and which is shut off by a curb from that part which is used by vehicles, is a sidewalk. The municipality is liable in damages if through negligence it allows a hole to be left in such sidewalk which causes injuries to a pedestrian.

Doyle v. City of Westmount, 42 D.L.R. 273, 24 Rev. Leg. 401.

SLIPPERY SIDEWALK—FAILURE TO SAND OR HARROW.

Failure to sand or harrow a slippery sidewalk before 9 a.m. when the conditions requiring it only arose on that morning is not "gross negligence," for which a city is liable under the Ontario Municipal Institutions Act, R.S.O. 1914, ch. 192, sec. 460 (3).

German v. City of Ottawa, 39 D.L.R. 669, 56 Can. S.C.R. 80, affirming 34 D.L.R. 632, 39 O.L.R. 176, 12 O.W.N. 64, which reversed 11 O.W.N. 331.

AUTO TRUCK SKIDDING—OILED STREET—DANGER AVOIDABLE — CONCLUSIVENESS OF VERDICT.

On an appeal from the dismissal by Murphy, J., after a trial, without a jury, of an action for damages resulting from the skidding of a motor truck upon an oiled roadway, held that it could not be said that the trial judge was clearly wrong (Macdonald, C.J.A., and Martin, J.A., were of the opinion that he was right) in finding that the driver of the truck might, had he exercised ordinary care and driven in a certain way, have avoided the danger.

Albion Motor Express Co. v. City of New Westminster (B.C.), [1918] 3 W.W.R. 19, affirming [1918] 1 W.W.R. 493.

AUTOMOBILES — COLLISION — INJURY TO PEDESTRIAN.

A driver of a motor vehicle which, without negligence on his part, collided with another motor vehicle and was forced upon the sidewalk and injured the plaintiff, held not liable to the latter.

Turnbull v. Graham (Alta.), [1918] 3 W.W.R. 1033.

COLLISION BETWEEN AUTOMOBILE AND STREET CAR—NEGLIGENCE OF STREET RAILWAY COMPANY—EVIDENCE—EXCESSIVE SPEED —FAILURE TO SOUND BELL OR WHISTLE — CONTRIBUTORY NEGLIGENCE — ULTIMATE NEGLIGENCE.

Moore v. Niagara, St. Catharines and Toronto R. Co., 14 O.W.N. 113.

COLLISION UPON HIGHWAY BETWEEN AUTOMOBILE AND STREET CAR—INJURY TO AUTOMOBILE AND DRIVER — ACTION BROUGHT BY DRIVER — ADDITION OF OWNER AS CO-PLAINTIFF—EVIDENCE— FINDINGS OF JURY — OPERATION OF "BACKING" STREET CAR — CONTROL FROM FRONT—QUESTION FOR ONTARIO RAILWAY AND MUNICIPAL BOARD — NEGLIGENCE OF CONDUCTOR—"MISJUDGING COURSE OF AUTOMOBILE"—FAILURE OF DRIVER OF AUTOMOBILE TO GIVE SIGNAL WHEN TURNING—REVERSAL OF JUDGMENT FOR PLAINTIFFS—NEW TRIAL REFUSED.

O'Dell v. Toronto R. Co., 15 O.W.N. 236.

II. Contributory.

A. GENERALLY.

(§ II A—75)—STREET RAILWAY—CROSSING —HILL.

The driver of a loaded vehicle climbing a steep hill has no special right of way over a street car track and must use reasonable care in crossing. Blindly crossing the track without looking to see whether a tram car is approaching or not is negligence which disentitles him to damages for injuries sustained.

Davie v. N. S. Tramways & Power Co. (N.S.), 41 D.L.R. 350.

DEATH OF PLAINTIFF'S HUSBAND BY FALLING FROM RAILWAY BRIDGE — EVIDENCE— FINDINGS OF JURY—DUTY OWING TO DECEASED—COMMON LAW DUTY — RAILWAY ACT, 1903, SEC. 180 (d)—ORDERS OF DOMINION BOARD OF RAILWAY COMMISSIONERS—STATUTORY DUTY.

Walsh v. International Bridge and Terminal Co., 15 O.W.N. 159, reversing 13 O.W.N. 411.

B. OF PERSONS UNDER DISABILITY.

(§ II B—86)—ATTEMPT TO CROSS STREET CAR TRACK.

A person who attempts to cross a street car track, when a car is too close to him to make it practicable for the motorman to stop the car or avoid striking him, cannot recover damages against the company.

Montreal Tramways Co. v. Hamilton, 43 D.L.R. 243, 27 Que. K.B. 575.

C. ON HIGHWAYS.

(§ II C—95)—RAILWAY CROSSING—REASONABLE CARE.

A person about to cross a track in front of an engine or car running on rails must exercise reasonable care. What is reasonable care depends on the circumstances of each case and is a matter to be determined by the jury.

Orth v. Hamilton, Grimsby and Beamsville Electric R. Co., 43 D.L.R. 544, 43 O.L.R. 137.

PUBLIC WORK — RAILWAY — COLLISION — STALLED AUTOMOBILE.

The collision of a train with an automobile stalled on a level crossing of the Intercolonial Railway, occasioned by the delay of the engine driver to apply his brakes the moment he became aware of the presence of the motor upon the track, is an accident "on a public work" and caused by the "negligence of an officer or servant of the Crown while acting within the scope of his duties or employment upon, in or about the construction, maintenance or operation of the Intercolonial Railway," within the meaning of sec. 20 of the Exchequer Court Act.

Dunnett v. the King, 41 D.L.R. 405, 17 Can. Ex. 357.

WORK ON ROAD—EXPIRY OF LICENSE.

A city corporation is not liable for negligence in the performance of work after the expiry of a license it has given therefor.

Tessier v. City of Ottawa, 40 D.L.R. 12, 41 O.L.R. 205.

INJURY TO AUTOMOBILE BY COLLISION WITH STREET CAR—FINDINGS OF JURY—CONTRIBUTORY NEGLIGENCE — ULTIMATE NEGLIGENCE.

Nesbitt v. Ottawa Electric R. Co., 14 O.W.N. 319.

AUTOMOBILE ON STREET CONTRARY TO BY-LAW—COLLISION.

The fact that a carter leaves his horse and wagon standing obliquely across a street in such a way as to block up more than half of its width, in violation of a municipal by-law, does not exonerate from all liability an automobile driver who imprudently causes a collision by passing at any risk rather than stopping and requesting room to pass. In such case it is contributory negligence.

Wayagamack Pulp and Paper Co. v. Girard, 27 Que. K.B. 101.

F. INJURY AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE; LAST CLEAR CHANCE.

(§ II F—120)—ULTIMATE NEGLIGENCE.

In an action for damages for injuries

sustained, where contributory negligence is alleged, a new trial will be ordered if the attention of the jury has not been directed to the question whether, but for the negligence of the defendant the accident might have been avoided, notwithstanding the negligence of the plaintiff, and their finding is not conclusive on this point. [Loach v. B.C. Electric R. Co., 23 D.L.R. 4; [1916] 1 A.C. 719, followed.]

Ontario Hughes-Owens v. Ottawa Electric R. Co., 39 D.L.R. 49, 40 O.L.R. 614. [See 15 O.W.N. 413.]

COLLISION WITH STREET CAR—ULTIMATE NEGLIGENCE.

A plaintiff cannot recover damages for injuries received where the responsibility for the accident has been placed upon both the plaintiff and the defendant, and the defendant could not, by the exercise of reasonable care after he became aware of the danger to the plaintiff, have avoided the accident. [See annotations 40 D.L.R. 103; 1 D.L.R. 783.]

Smith v. City of Regina, 42 D.L.R. 647, 11 S.L.R. 291, [1918] 2 W.W.R. 1010, affirming 34 D.L.R. 238, 21 Can. Ry. Cas. 270, 10 S.L.R. 72.

COLLISION BETWEEN TRAIN AND AUTOMOBILE —ULTIMATE NEGLIGENCE.

In an action for damages because of the destruction of the plaintiff's motor car by a train, the trial judge after consideration of the findings of the jury, held the effect of them to be a finding that the decisive negligence was that of the brakeman, and, therefore, gave judgment for the plaintiff. [Rice v. Toronto R. Co., 22 O.L.R. 446; B.C. Electric R. Co. v. Loach, [1916], 1 A.C. 719, 23 D.L.R. 4; Smith v. Regina, 34 D.L.R. 238; Columbia Bithulithic Ltd. v. B.C. Electric R. Co., 37 D.L.R. 64; Morrison v. Dom. Iron & Steel Co., 45 N.S.R. 466; City of Calgary v. Harnovis, 5 W.W.R. 869 discussed.] Quære, whether Smith v. Regina, supra, has been overruled by Columbia Bithulithic v. B.C. Electric R. Co., supra.

Gavin v. Kettle River Valley R. Co. (B.C.), [1918] 1 W.W.R. 251. [See 43 D. L.R. 47.]

NEGOTIABLE INSTRUMENTS.

See Bills and Notes; Cheques; Banks.

NEWSPAPER.

Libellous publication, see Libel and Slander.

NEW TRIAL.

I. IN GENERAL; AS MATTER OF RIGHT.
II. FOR ERRORS OF THE COURT.
III. FOR MATTERS PERTAINING TO JURY OR VERDICT.
A. In general.
B. Erroneous verdict.
C. Selection and qualification of, or influence upon, jurors.
D. Misconduct or separation of jurors; compromise verdict.
IV. NEW EVIDENCE; SURPRISE.
V. PRACTICE.
A. In general; time.
B. Motions; statement.
C. Evidence; affidavits generally.
D. Testimony or affidavits of jurors.
E. Remittitur.
F. Granting new trial of some issues.

Annotation.

Judge's charge; instruction to jury in criminal case; misdirection as a "substantial wrong"; Cr. Code (Can.), 1906, sec. 1019: 1 D.L.R. 103.

I. In general; as matter of right.

(See previous Annual Digests.)

II. For errors of the Court.

(§ II—5)—CIVIL ACTION — ACQUITTAL ON CRIMINAL CHARGE.

If a perusal of the judgment of a District Court Judge convinces the Court of Appeal that he has been influenced in his judgment in a civil action by the fact that the plaintiff had been acquitted on a criminal charge, a new trial will be ordered.

Goldston v. Alameda Farmers Elevator & Trading Co. (Sask.), 43 D.L.R. 607.

CHARGE TO JURY—CRIMINAL TRIAL—SUBSTANTIAL WRONG.

Although some of the expressions used by the trial judge in his charge to the jury may be open to criticism, a new trial will not be granted under the Criminal Code if there has been no substantial misdirection, and the court is satisfied that there has been no miscarriage of justice. [Re Dodds, 1 Cr. App. R. 68, and Re Martin, 1 Cr. App. R. 52, referred to.]

Rex. v. Letain (Man.), 29 Can. Cr. Cas. 389, 28 Man. L.R. 386, [1918] 1 W. W.R. 505.

MISDIRECTION — DEFENCES — MISREPRESENTATION—INSANITY.

A judge's charge to a jury must be read as a whole, and a misdirection therein must be a substantial one or contain an element tending to mislead or confuse before it can be a ground for a new trial [Blue v. Red Mountain R. Co., [1909] A.C. 361, at p. 368; White v. Victoria Lumber, etc., Co., [1910] A.C. 606, at p. 611, followed]. In an action against executors for the amount of calls upon shares in a company in which the testator was a shareholder, the defendants set up the defence of mental incompetency to contract and misrepresentation. In charging the jury the judge said: "One or both of these defences may be true, but they cannot both be true. If he were mentally incompetent, then the question of misrepresentation would not arise at all, but

in order that a misrepresentation could be made to him and be effective to enable his executors to get out of the contract, you must first start with the proposition that he was capable of making a contract.'' The jury gave a general verdict for the plaintiff. The defendant upon appeal complained of misdirection. Held, that reading the charge as a whole, no ground had been shown why the verdict should be set aside and a new trial ordered.

Canadian Financiers Trust Co. v. Ashwell, [1918] 1 W.W.R. 207, 25 B.C.R. 97.

(§ II—7)—PREJUDICIAL REMARKS — ALIEN ENEMY.

A new trial will be ordered where a jury has been prejudicially influenced by counsel's improper comment that the defendant was of enemy and the plaintiff of friendly nationality by birth.

D. v. B., 38 D.L.R. 243, 40 O.L.R. 112.

(§ II—8)—MISDIRECTION.

A misstatement of evidence by a trial judge, however trivial, to the jury, and his refusal to correct it, is good ground for a new trial.

Rex. v. Kleparczuk, 39 D.L.R. 171, 13 A.L.R. 212, 29 Can. Cr. Cas. 336, [1918] 1 W.W.R. 695.

DAMAGES—FATAL INJURIES ACT — MISDIRECTION.

In an action for damages under the Fatal Injuries Act (R.S.N.S. 1900, ch. 178), it is misdirection for the trial judge to instruct the jury to do what they consider fair and reasonable without explaining to them the limitations of the Act, and the principles upon which the amount is to be calculated.

O'Hendley v. Cape Breton Electric Light Co., 39 D.L.R. 412, 52 N.S.R. 25.

AUTOMOBILES—COLLISION—DEATH — DAMAGES—NEGLIGENCE—INSTRUCTIONS.

A person injured by more than one wrong-doer may maintain an action for the whole damages done to him against any of them. In an action for damages under the Fatal Accidents Act for the death of a person killed in a collision between a motor truck and a motor cycle, in the side car of which deceased was a passenger, the jury should be distinctly told that unless the deceased was guilty of some default on his part amounting to contributory negligence, he was not affected by the fact that the driver of the motor cycle was guilty of negligence that caused the accident: and should be further instructed that they might find defendants guilty of negligence if the driver of the truck was guilty of any negligence that contributed to the accident, notwithstanding the fact that they found the driver of the motor cycle also guilty of negligence.

Coop v. Robert Simpson Co., 42 D.L.R. 626, 42 O.L.R. 488.

(§ II—9) — INSUFFICIENCY OF ISSUES — NEGLIGENCE — COLLISION — RAILWAY —AUTOMOBILE.

In an action for damages for injuries sustained in a collision between a motor car and a passenger train, when both parties have been guilty of negligence, a new trial will be ordered where the court has failed to submit the mutual obligations of the parties to the jury, with proper and complete directions on the law and as to the evidence applicable so as to enable them to come to a reasonable conclusion.

Gavin v. Kettle Valley R. Co. (B.C.), 43 D.L.R. 47, [1918] 3 W.W.R. 385. [See [1918] 1 W.W.R. 251].

MASTER AND SERVANT—DEFECTIVE APPLIANCES—INSUFFICIENCY OF ISSUES.

A new trial will be ordered in an action for damages for injuries sustained by reason of defective appliances, where the question as to whether the master did all that should be expected from a reasonably careful and prudent employer of labor to avoid the danger, or to discover and remedy it were not fully and adequately placed before the jury, although the judge's charge to the jury was not objected to at the trial.

Goodwin v. Taylor, 43 D.L.R. 610, 43 O.L.R. 141.

(§ II—9a)—IRRELEVANT EVIDENCE — SUBSTANTIAL WRONG.

A verdict will not be set aside on account of the improper admission of irrelevant evidence where it has not occasioned any substantial wrong or miscarriage of justice.

Farnell v. Conway, 41 D.L.R. 649, 45 N. B.R. 343.

The fact that irrelevant testimony was admitted on the trial of an action is not alone sufficient to justify the granting of a new trial. If, however, the illegal evidence may have influenced the verdict, a new trial will be ordered. [Tait v. Beggs, [1905] 2 I.R. 525, referred to.]

Boyd v. Larson, 42 D.L.R. 516, 11 S.L.R. 324, [1918] 2 W.W.R. 1069. [Affirmed by the Supreme Court of Canada.]

DOCTOR — MALPRACTICE — EXHIBITION OF WOUND TO JURY.

In an action against a doctor for malpractice, a new trial will be granted, on the ground of improper admission of evidence, where the plaintiff was allowed to exhibit to the jury a wound caused by an operation performed by another doctor, without defendant's consent or knowledge, and the jury were not warned that they were not to draw conclusions from its appearance.

Richardson v. Nugent, 40 D.L.R. 700, 45 N.B.R. 331.

AGREEMENT FOR SALE OF LAND AND BUILDING —REFUSAL OF TRIAL JUDGE TO ALLOW CERTAIN EVIDENCE.—ERRORS.

Goose Lake Grain & Lumber Co. v. Wil-

son, 42 D.L.R. 776, 11 S.L.R. 274, [1918] 2 W.W.R. 1018. [See 40 D.L.R. 271.]

III. For matters pertaining to jury or verdict.

A. In general.

(§ III A—10)—Criminal law — Manslaughter—Motion for new trial made to trial judge after verdict—Affidavit of witness contradicting testimony given at trial—Power of trial judge—Leave to move Court of Appeal for new trial—Criminal Code, sec. 1021—Weight of evidence—Refusal of leave—Reservation of question of law for Court of Appeal—Suspension of sentence—Code, sec. 1023.

Rex v. Di Francesco, 15 O.W.N. 138.

B. Erroneous verdict.

(§ III B—15)—Nominal damages.

A new trial will not be granted to enable a party to an action to recover nominal damages only.

Dunham v. Marsden, 38 D.L.R. 24, 45 N.B.R. 279.

(§ III B—16) — Jury — Verdict against the weight of evidence.

O'Leary v. Smith, 40 D.L.R. 744, 45 N. B.R. 424. [Appeal to Supreme Court of Canada pending.]

(§ III B — 17) — Damages — Breach of contract—Sale—Motion to increase verdict.

In an action for damages for breach of contract for failing to deliver a quantity of pulpwood purchased by the plaintiff from the defendant, the weight of the evidence was greatly in favour of the alleged breach. The jury found a general verdict for the plaintiff for $75, an amount paid on account of the purchase price. Held, on an application to increase the verdict to the amount of damages claimed, or for a new trial, that the plaintiff was entitled to substantial damages and the verdict was against the weight of evidence, but as, under the evidence, the jury might have assessed the damages at an amount less than that claimed by the plaintiff, the court refused to order a verdict for the amount claimed and ordered a new trial on the question of damages only.

Morin v. Tardif, 45 N.B.R. 272.

(§ III B—19)—Failure of jury to answer questions.

A new trial will be ordered where the jury has failed to answer a question of fact submitted to them, the answer to which is necessary to the proper determination of the case. [McPhee v. Esquimalt & Nanaimo R. Co., 16 D.L.R. 756, referred to.]

Gibbs v. Northern Construction Co. (B.C.), 43 D.L.R. 276, [1918] 3 W.W.R. 396. [See [1918] 1 W.W.R. 575.]

C. Selection and qualification of, or influence upon, jurors.

(§ III C—23)—Juror influenced by improper motives—Duty of judge and counsel.

Whenever and as soon as it becomes known to a trial judge that a juror is actuated by improper motives, it is the duty of the judge, of his own motion, to protect the litigants from the results of such a scandal by then and there discharging the jury and summoning another, as would have to be done in the case where a juror is discovered to be insane or to have accepted a bribe. Where such course is not taken there should be a new trial. It is the duty of a trial judge, in negligence cases particularly, to submit questions to be answered by the jury, where the judge can properly do so. It is therefore the duty of counsel engaged in such a case to allow the questions to be put and the answers to be made, and they should not interfere with the judge in the exercise of that duty by pointing out or suggesting to the judge that the jury is not obliged to answer the questions. [Armishaw v. B.C. Elec. R. Co., 18 B.C.R. 152, 14 D.L.R. 393, followed.] (Per Martin, J.A.; McPhillips, J.A., concurring.)

Howard v. B.C. Electric R. Co. (B.C.), [1918] 3 W.W.R. 409.

IV. New evidence; surprise.

(§ IV—31)—New evidence.

A new trial will not be ordered where the new evidence proposed to be adduced might have been produced at the former trial.

Conrad v. Halifax Lumber Co. (N.S.), 41 D.L.R. 218.

The discovery, after the trial, of new evidence which satisfies the court that if the party had had it at the trial he must have had a verdict, is sufficient ground for a new trial in order to do justice between the parties. The discovery of witnesses who can contradict those produced on the trial is no ground for a new trial.

Gibbons v. Hatfield (N.B.), 43 D.L.R. 346.

V. Practice.

(See previous Annual Digests.)

NON-RESIDENT.

Jurisdiction over, see Courts; Aliens.

Security for costs, see Costs.

Service on generally, see Writ and Process.

Attachment against, see Attachment; Garnishment.

Foreign corporations, see Companies.

Testimony of non-residents, see Depositions; Discovery.

NOTARY.

LIABILITY — HYPOTHEC—PAYMENT—GOOD FAITH.

A notary, who holds a receipt for the payment of a hypothec signed in advance by the hypothecary creditor, becomes the agent of the latter to receive the amount due by the debtor, whether in money or by cheque to his order; it follows that another notary, who in good faith advised the debtor to pay the hypothecary debt by cheque to the order of such agent, commits no fault and is not liable if the notary runs off with the money and becomes a speculator.

Pepin v. Mousseau, 24 Rev. Leg. 176.

NOTES.

See Bills and Notes.

NOTICE.

Of trial, see Trial.
Of appeal, see Appeal.
Of non-payment of note, see Bills and Notes.
Of personal injuries or damage to property; see Municipal Corporations; Highways.

NUISANCES.

Annotation.

Unreasonable user of highway as nuisance: 31 D.L.R. 370.

(§II A—30)—ABATEMENT—PUBLIC HEALTH ACT, SECS. 6, 81 (2)—REPORT OF PROVINCIAL BOARD OF HEALTH—ORDER OF JUDGE OF SUPREME COURT—AFFIDAVITS CHALLENGING CORRECTNESS OF REPORT AND IN SUPPORT OF REPORT—REFUSAL OF JUDGE TO ENLARGE MOTION—CONTRACT FOR DISPOSAL OF GARBAGE OF CITY—LIABILITY OF CITY CORPORATION FOR NUISANCE — CONTRACTOR CONSIDERED AGENT OR SERVANT OF CORPORATION—EXTENSION OF TIME FOR ABATING NUISANCE —APPEAL—COSTS.

Re Waterloo Board of Health; Campbell's Case, 15 O.W.N. 234.

NUISANCE — ESTABLISHED BUSINESS—MOTION FOT INTERIM INJUNCTION.

Eden v. Birks, 14 O.W.N. 362.

OFFENSIVE ODOURS —EVIDENCE — POSITIVE AND NEGATIVE TESTIMONY — ACQUIESCENCE — EASEMENT — DECLARATION —INJUNCTION — DAMAGES — SPECIAL DAMAGE — NOMINAL DAMAGES—COSTS.

Danforth Glebe Estates v. Harris & Co., 15 O.W.N. 21.

(§ II C—40) — INDICTMENTS FOR PUBLIC NUISANCE.

The effect of sec. 223 of the Criminal Code is to leave indictment as a method of procedure for trying the general question whether a common nuisance to the detriment of the property or comfort of the public generally, though not affecting life, safety or health, has been committed; but where life, safety or health is not involved (Cr. Code sec. 222) the conviction on such indictment is not for a crime but for a civil wrong only, and the consequential proceedings to which sec. 223 refers are not for the punishment of the person convicted but for the abatement or remedy of the mischief done.

Toronto Railway Co. v. the King, 38 D. L.R. 537, [1917] A.C. 630, 29 Can. Cr. Cas. 29, reversing 25 D.L.R. 586, 25 Can. Cr. Cas. 183, 34 O.L.R. 589.

(§ III—56)—ENDANGERING PUBLIC COMFORT —OVERCROWDED STREET CARS.

The franchise granted to a street railway company by agreement between it and the municipality, confirmed by the Provincial Legislature, to operate street cars on the public streets, does not make the overcrowding of the street cars a public nuisance within Cr. Code sec. 223, where the lives, safety or health of the public are not endangered, and where no injury is occasioned to the person of any individual (Cr. Code sec. 222); and a demurrer to an indictment in so far as it charged same should have been allowed.

Toronto Railway Co. v. the King, 38 D. L.R. 537, [1917] A.C. 630, 29 Can. Cr. Cas. 29, reversing 25 D.L.R. 586, 25 Can. Cr. Cas. 183, 34 O.L.R. 589.

OATHS.

Annotation.

Authority to administer extra-judicial oath:: 28 D.L.R. 122.

OBSTRUCTING OFFICER.

Annotation.

Summary proceedings for obstructing peace officer: 27 D.L.R. 46.

OFFER AND ACCEPTANCE.

See Contracts.

OFFICERS.

I. SELECTION; INCUMBENCY; REMOVAL.
A. In general; eligibility.
B. Appointment and election.
C. Qualifying; induction; vacancy.
D. Term; holding over.
E. Resignation or deprivation of office.
F. Contest of title.
II. RIGHTS; POWERS; DUTIES; LIABILITIES.
A. Rights, powers and duties generally.
B. Compensation and fees.
C. Liabilities.

I. SELECTION; INCUMBENCY; REMOVAL.

A. In general; eligibility.

(§ I A—10)—ELECTIONS ACT—PETITION—QUO WARRANTO.

Sec. 192 (b) of the Manitoba Municipal

Elections Act refers not only to persons who are "disqualified" under secs. 53-57, but also to persons who lack the qualifications necessary under sec. 52 to make them eligible for election. Where proceedings are taken after an election to unseat a municipal officer on the ground of want of qualification, such proceedings should be by way of petition and not of quo warranto.

The King ex rel Dumas v. Leclair, 42 D.L.R. 643, 28 Man. L.R. 622, [1918] 2 W. W.R. 858.

MUNICIPAL COUNCILLORS — MAYOR — LITERACY.

It is not sufficient, in order to be nominated for or elected to the office of mayor or municipal councillor, or to be appointed to other municipal offices and occupy them, to know how to read print, or to sign his name, or even to be able to do both; it is necessary to be able to read and write fluently; and this law admits of no exception for municipalities peopled with settlers where those knowing how to read and write fluently are few in number.

Lacaille v. Desmanches, 24 Rev. Leg. 345.

MUNICIPAL COUNCILLORS—PROPERTY QUALIFICATION — VALUATION — PAROL EVIDENCE.

Although under the authority of arts. 228 and 670 of the old Municipal Code, as amended by 35 Vict. ch. 8, sec. 2, the real property qualification of a municipal councillor was not determined exclusively by the valuation roll, and parol evidence could be admitted as to the actual value of the property; it is not so under the new Municipal Code; and if the real property upon which the candidate desires to qualify is estimated at less than $400, evidence that it is actually worth more is not admissible. To establish such qualification, all charges or hypothecs encumbering the property must be deducted from the value shown on the roll, and not from the actual value.

Ouellette v. Boulay, 24 Rev. Leg. 170.

ALDERMAN—VALUATION ROLL—QUO WARRANTO.

Under art. 5364, R.S.Q. (Cities and Towns Act), it is the real property valuation, as it appears on the municipal valuation roll in force, which determines the electoral qualifications of aldermen. Such valuation cannot be contested nor questioned under the pretext that it does not represent the actual value of the real property, with a view of basing a defence to an application for a quo warranto.

Mercier v. Martin, 54 Que. S.C. 457.

C. QUALIFYING; INDUCTION; VACANCY.

(§ I C—31)—AUDITOR—OATH OF OFFICE—OMISSION.

An auditor named by the council, under the authority of art. 642, Mun. Code, to make an audit of the books of the secretary-treasurer, is a municipal officer and, as such, is required to take the oath of office before fulfilling the duties of his office. The omission of an auditor to take such oath in the delay fixed by law implies a refusal to accept the office, and makes absolutely void all acts which he pretended to accomplish as the holder of such office.

Ross v. Ste. Anne de la Pointe au Père, 53 Que. S.C. 388.

CHURCH CONSTABLE—OATH OF OFFICE—NOTICE OF ACTION.

A church constable is a public officer and, like any other public officer, he cannot exercise the functions of his office without having previously taken the oath of office. A public officer who omits to take the oath of office cannot claim the immunities attached to the office. In particular, he is not entitled to the notice of action prescribed by art. 88, C.C.P.

Thivierge v. Roberge, 53 Que. S.C. 537.

E. RESIGNATION OR DEPRIVATION OF OFFICE.

(§ I E—55)—DISMISSAL FROM OFFICE — NOTICE.

Under the Cities and Towns Act, a municipal council may, upon a vote of the absolute majority of the council, remove, when it thinks proper, a municipal officer it has appointed; it does not have to give notice of dismissal; and the dismissed officer has no recourse against the corporation for loss of salary or compensation.

Roy v. La Ville de Grand Mère, 53 Que. S.C. 119, 54 Que. S.C. 21.

II. Rights; powers; duties; liabilities.

C. LIABILITIES.

(§ II C—85)—NEGLIGENCE—CUSTOMS OFFICIALS—ANIMALS.

The liability for wrongful seizure and detention of animals by the Crown's Customs officials being one in tort is not actionable against the Crown.

Bonneau v. the King, 42 D.L.R. 490, 18 Can. Ex. 135.

OPPOSITION.

REJECTION ON MOTION—FRAUD—CREDITOR.

An opposition can only be struck out on motion if "prima facie" it is frivolous, that is, if it is evidently made for the purpose of unjustly delaying the sale of the effects seized; if the facts on which it is based are openly false, or else if the points of law on which it is based are indubitably ill-founded. Thus, an opposition raising the point whether the revocation of a deed on the ground of fraud or simulation is only to the benefit of the creditor applying for same or whether all the other creditors may claim it, cannot be struck out on motion, as the best authors are not unanimous on that principle of law.

Tremblay v. Monsour, 53 Que. S.C. 84.

SECURITY — TRANSFER — MOTION TO DISMISS.

An opposition to secure charges which alleges a tranafer of the rents of the property as security for a claim, which transfer has been registered on the property, and asks that the property be sold burdened with that obligation, raises a serious question and cannot be dismissed on a simple motion.

Cuddy v. Brodeur, 20 Que. P.R. 123.

OPPOSITION FOR PAYMENT—MOTION TO EXAMINE—COSTS.

Art. 651, C.C.P. (Que.), which allows the examination of the opposite party if his opposition seems frivolous, does not apply to an opposition for payment, which is subsequent to the sale. If such a motion is granted, and a useless examination takes place, the party that caused such proceedings should pay the costs.

Beaupre v. Gravel, 20 Que. P.R. 26.

OPPOSITION TO ANNUL—JUDGMENT—EXECUTION—SURETY.

When one of the defendants has failed to appear and is ordered to pay, he cannot, by opposition to annul, ask for the nullity of the execution taken under the judgment against him, for the reasons that his co-defendant had filed a declinatory exception which had been upheld, and being the joint and several surety of his co-defendant he was not compelled to pay the debt as long as judgment was not given against the latter.

Eugene Julien et Cie., v. Chevanelle, 20 Que. P.R. 6.

SEIZURE—TITLE TO GOODS — MOTION TO STRIKE.

An opposition, by which one declares his ownership of the goods seized "as having acquired them with his own money, in the ordinary course of business," will not be struck out on motion.

Cailloux v. Houde, 20 Que. P.R. 169.

SECOND OPPOSITION — JUDGMENT — AMBIGUITY—ORDER TO SUSPEND.

An order to suspend will not be granted on the filing of a second oppositon based on grounds: (1) that the judgment dismissing the first opposition is ambiguous; (2) the date on which the judgment may be executed is not mentioned in the return (procès verbal); and (3) the creditor has proceeded immediately after the dismissal of the first opposition.

Prudhomme v. Decarie, 19 Que. P.R. 224.

ORAL EVIDENCE.

See Evidence, VI.

ORDERS.

See Judgment; Motions and Orders; upon foreclosure, see Mortgage; Vendor and Purchaser.

ORDINANCES.

See Municipal Corporations.

OVERHOLDING TENANT.

See Landlord and Tenant.

PARENT AND CHILD.

(§ I—1)—SUM OF MONEY HANDED BY FATHER TO DAUGHTER—LOAN OR GIFT—EVIDENCE.

Preston v. Barker, 14 O.W.N. 119.

(§ II—10)—LEGITIMACY—CORRECTION OF REGISTER.

The correction of registers of civil status as to the legitimacy of a recognised child can be made only through a principal action by calling into the case all the interested parties, including the child itself.

Crepeau v. Gareau, 19 Que. P.R. 323.

(§ IV—45)—DESERTED CHILD—CHILDREN'S PROTECTION ACT—RIGHT OF PARENT.

The parents being both in jail on criminal charges, their children were taken in charge under the Children's Protection Act as deserted children. After their release the parents applied for the return of the custody of the eldest child. This application was refused.. A subsequent application for an order compelling the Superintendent of Neglected Children to inform them of the whereabouts of the then youngest children, and to keep them informed of any changes, was granted. The Superintendent of Neglected Children complied with the order as to the present whereabouts, but appealed from the order, objecting to be under the obligation in case of future changes. The Court held, Harvey, C.J., and Hyndman, J., dissenting, that a Judge of the Supreme Court as persona designata had jurisdiction to make the order. Per Stuart, J.:—There is nothing in the statute which has the effect of destroying the Court's inherent power to control the guardian who has been substituted for the natural guardian. . . . There should be, however, a right reserved to the Superintendent to shew that for some special reason, arising out of very special and temporary circumstances, he ought to be allowed to keep the whereabouts of the child, for a time, concealed from the parent. Per Beck, J.:—The intention of the Act is to leave the parents' rights and duties existing with respect to their neglected children unaffected, except in so far as the circumstances with respect to character and conduct on the part either of the parents or the child make it expedient, having regard only to the interest of the child, that the parents shall not be allowed to have the control of the child.

Re Triskow and Children's Protection Act (Alta.), 43 D.L.R. 452, [1918] 3 W.W.R. 512, 14 A.L.R. 46.

PARTICULARS.

See Pleadings, I.

PARTIES.

I. Plaintiffs.
A. Persons who may or must sue; interested parties.
B. Joinder.
II. Defendants.
A. Proper and necessary parties.
B. Joinder.
III. Bringing in; intervention; third party.

Annotations.

Irregular joinder of defendants; separate and alternative rights of action for repetition of slander: 1 D.L.R. 523.

Persons who may or must sue; criminal information; relator's status: 8 D.L.R. 571.

I. Plaintiffs.

A. Persons who may or must sue; interested parties.

(§ I A—1)—Action by mortgagee on insurance policy—Owner.

Where an action upon a fire insurance policy is brought by the mortgagee of the insured premises, the owner, although mentioned as the insured, is not a necessary party, if his only interest in the insurance moneys is that the amount thereof paid discharges, in part, his mortgage, it being for a larger amount than that assured by the policy. [Brandt v. Dunlop Rubber Co., [1905] A.C. 454, followed.]

Pachal v. Germania Fire Ins. Co. (Sask.), [1918] 1 W.W.R. 502.

(§ I A—15)—Sale—Interest of vendor.

A vendor of real property, required by law to deliver such property, has a sufficient interest to take an action to make one who detains it illegally, give it up.

Beaucage v. Brunette, 54 Que. S.C. 383.

(§ I A—40)—Interest of assignor as party—Lien note—Endorsement—Equitable assignment.

Canadian Bank of Commerce v. La Brasch, 39 D.L.R. 398, 10 S.L.R. 408, [1918] 1 W.W.R. 8.

B. Joinder.

(§ I B—55)—Written consent.

In order that a person be added in an action as a party plaintiff there must be a consent in writing signed by the party thus to be added. [Henderson v. Pinto Creek, 33 D L.R. 599, 10 S.L.R. 105, followed.]

Gardiner v. Muir, 38 D.L.R. 115, 10 S.L.R. 388.

Action to set aside will—Joinder of beneficiaries—Order for representation—Persons "having same interest"—Costs.

In an action by one of the next of kin of a deceased testator to set aside bequests made in the will to the defendants, it appeared when the case came on for trial that, in the event of the plaintiff's success, the sums bequeathed to the defendants would necessarily be distributed amongst the next of kin of the deceased, and that there were other persons in the same relationship to the deceased as the plaintiff. Held, that all those who would be benefited by the success of the action should be made parties or be represented. The representation contemplated by rule 75 is a representation of a class "having the same interest"—i.e., interest in the result of the action. An order was made directing that the record and proceedings in the action be amended by striking out the name of A.D.M. as plaintiff and substituting therefore, "A.D.M., suing on behalf of himself and all other the next of kin of the late S.M. and of all those who would be benefited by the action succeeding," and providing that A.D.M. should in the action represent the said next of kin and persons who would be so benefited. The costs of the order were made costs in the cause and payable by the plaintiff. These costs included the costs of the application at the trial for an order of representation, of a motion to vary the minutes of the order, and of amending the writ of summons and the style of cause and the pleadings.

May v. Wheaton, 41 O.L.R. 369.

Persons claiming for services—Threshing.

Two persons employed together by the same person to thresh grain may be joined as plaintiffs in an action to recover their remuneration.

Dusbabek v. Bjornstad (Sask.), [1918] 3 W.W.R. 79.

II. Defendants.

A. Proper and necessary parties.

(§ II A—65)—Right of assignee to sue in own name.

The Rules of Practice and Procedure of the Supreme Court of Ontario, including rule 85, having been confirmed by statute, have the force of a legislative enactment. There is nothing in the rule which conflicts with R.S.O. 1914, ch. 109, sec. 49, and both enactments may stand together; and now that fusion of law and equity has taken place, and the rules of equity, where they are in conflict with the rules of law, are to prevail, rule 85 now applies to an action in the Supreme Court of Ontario, and enables an equitable assignee to sue in his own name where the assignment is of the whole fund, leaving no beneficial interest in the assignor.

Graham v. Crouchman, 39 D.L.R. 284, 41 O.L.R. 22.

B. Joinder.

(§ II B—115)—Improper joinder—Contracts—Service out of province—Discretion.

British publishers of a reprint of English Law Reports issued a prospectus, prior to publication, estimating that each set would contain about 150 volumes of about 1,500 pages each. The sets were sold at a fixed price per volume. The plaintiffs, sellers of law books in the United States of America,

made an agreement with the British publishers to take a certain number of sets, at a stipulated price per volume; and, as part of their plan for disposing of their sets, made an agreement with the defendants, doing business in Ontario, to sell them a certain number of sets, at a named price. This agreement was made on the faith of the prospectus. There was no contract between the publishers and the defendants. The publishers cut down the number of pages in the volumes, so that when 150 volumes had been issued, the reprint had not been completed, and it was expected that the sets would run to 200 volumes. When the volumes reached 150, the defendants refused to pay for the additional volumes; and, volumes 151-154 having been delivered, the plaintiffs sued the defendants for the price. The defendants pleaded that they had paid the full price, and asked for a declaration that they were entitled to the remaining volumes without further payment. An order was made, on the application of the plaintiffs, adding the British publishers as defendants, permitting service to be made upon them in Great Britain, and allowing the plaintiffs to amend their statement of claim by setting out the contracts and the contention of the defendants, and by claiming a declaration that, if the original defendants should succeed in their contention, the added defendants should be declared liable, for the reason that the prospectus was theirs, and the default, if any, theirs. This order was set aside on appeal, it being held that (the two contracts being quite distinct and between different parties) the added defendants were not proper parties to the action brought against the original defendants (rule 25 (1) (g)), applying the criterion of rule 67, relating to the joinder of parties and of causes of action. [Oesterreichische Export A.G. v. British Indemnity Insurance Co., [1914] 2 K.B. 747, distinguished.] Held, also, that the right to allow service out of Ontario is one which must be exercised in accordance with a sound judicial discretion; rule 67 (2) enables the Court to deal with the case if the joinder is deemed oppressive or unfair; and no sound principle could justify the bringing in Ontario of an action by foreigners against defendants in Great Britain, upon a contract neither made nor to be performed within Ontario.

Boston Law Book Co. v. Canada Law Book Co., 43 O.L.R. 13, affirmed in 43 O.L.R. 233. [See 15 O.W.N. 294.]

III. Bringing in; intervention; third party.

(§ III—120)—Trustees.

If trustees sued plead that the sum claimed from them does not belong to the plaintiff but to a third person, the Court, before judgment, will order the plaintiff to add such person in the cause.

Campbell v. Nelles, 19 Que. P.R. 13.

Solicitor and client—Fees—Execution—Intervention.

Whoever is interested in the process of a suit can intervene in order to protect his rights. So in a case where an execution was issued, and a seizure of movable property made by an advocate distraining for his costs, his client, defendant in the suit, can contest the opposition made to such seizure by a third party, seeing that it is to the interest of such contestant to see that his advocate is paid. The proper proceeding in the above case would be intervention, but the Court will not reject the contestation for that reason considering that the contestant, being the defendant, is already a party in the suit.

Trahan v. Painchaud, 53 Que. S.C. 445.

PARTITION.

(§ I—1)—Second action.

A party to partition proceedings cannot bring a second action in partition as long as the nullity of the first proceedings has not been judicially established. The action to annul should be brought against all the co-partitioners.

Maher v. Archambault, 42 D.L.R. 213, 56 Can. S.C.R. 488, affirming 25 Que. K.B. 436.

"Common"—Right of pasturage and fuel—Co-ownership—Servitude.

Rights of pasturage and cutting fuel formerly granted by a seigneur to his serfs in common, upon a piece of land called "common," are rights of user or real servitude, but are not rights of undivided co-ownership; such rights are not sufficient to base thereon an action for partition of such common by the heir of the seigneur against the representatives of the original grantees.

Dutremblay v. Lanouette, 53 Que. S.C. 6.

(§ II A—16)—Community—Liquidation—Parties.

Although, generally speaking, a co-heir cannot ask the division of assets belonging to a community and attack the title of a third party in possession of an immovable property which has belonged to him, unless he has previously obtained the winding-up of that community, yet that winding-up is not necessary when such immovable property is the sole asset of the community. (Per Cross, J.): In the case of an action for compulsory partition and licitation of an immovable property, the sole asset of a community, should there be offered to the plaintiff an amount of money equal to the value of his share as established by a report of experts, less his proportion of the debts, the action for licitation should be at his own expense.

Pérodeau v. Quéry, 27 Que. K.B. 524.

PARTNERSHIP.

I. Nature; creation; what constitutes.
II. Rights and powers of partners.
III. Liability of partners; rights of creditors.
IV. Partnership real estate.
V. Rights of members as to each other.
VI. Dissolution; effect of.
VII. Actions.

Annotation.

Effect of war on alien partnerships and firms: 23 D.L.R. 375, 378.

I. Nature; creation; what constitutes.

(§ I—1)—AGENCY—CONTRACT OF EMPLOYMENT.

An agreement by which one party agrees to make a sale of certain animals, to give them care, and to be engaged also in the sale of milk and cream on a farm belonging to the other party, in consideration of the remuneration of a sum equal to half the net profits realized, is not a partnership but an agreement of mandate, or of lease and hire of work. If one so hired takes a part of the animals and appropriates them, he will be deemed a purchaser and must pay their value.

Béique v. Gaston, 54 Que. S.C. 162.

CONTRACT—DONATION INTER VIVOS—ACTIONS.

An agreement between the owner of an immovable and a third party with regard to a lot of land held to be a deed of gift inter vivos by the owner (which would, however, be void, having been made under private seal and not registered) rather than a partnership deed. Nevertheless, where the parties have treated it as a partnership, the Court should consider it as such. A settlement of accounts of a dissolved partnership should, as a rule, be made by an action pro socio, when such accounts are uncertain and undetermined. In such case an action brought by one of the members for a fixed amount of damages will be dismissed.

Jasmin v. Jasmin, 24 Rev. Leg. 411.

CLUB PROPERTY—EXECUTION.

An association of persons who, for their personal amusement exclusively, bought a house in the country, calling it "The Dominion Fish & Game Club," does not constitute a partnership. Each owns his own individual share, which can only be seized by way of execution, not by garnishment.

Robertson v. Guilbault, 54 Que. S.C. 343.

II. Rights and powers of partners.

(§ II—5)—AUTHORITY OF PARTNER—AS AGENT.

Under sec. 7 of the Partnership Act (R.S.S. ch. 143), a partner is an agent for the firm, for the purpose of the business of the partnership, but it is only his acts done for carrying on, in the usual way, the business of the kind carried on, that bind the firm and his partners.

Satallick v. Jarrett & Redick, 38 D.L.R. 63, 10 S.L.R. 432, [1918] 1 W.W.R. 91.

III. Liability of partners; rights of creditors.

(§ III—10)—ENDORSEMENT OF NOTES—PARTNERSHIP NAME.

A partner who suffers his co-partner to habitually endorse, with the partnership name, personal notes which he discounts, the proceeds of which he applies to his personal business and to that of the partnership, is liable in the same way as if the moneys obtained on the face of such endorsements had benefited the partnership business exclusively.

McKeen v. Molsons Bank, 53 Que. S.C. 524.

IV. Partnership real estate.

(See previous Annual Digests.)

V. Rights of members as to each other.

(§ V—21)—ACTION IN NAME OF PARTNERSHIP BY ONE MEMBER WITHOUT CONSENT OF OTHERS—VALIDITY—ACCOUNTING.

Black Hill Threshing Syndicate v. Cole (Sask.), 42 D.L.R. 790.

VI. Dissolution; effect of.

(§ VI—25)—RECEIVER—LEASE.

A partnership at will is for all practical purposes dissolved when a receiver is appointed, and one partner has then a right to lease the partnership premises and hold it for his own personal benefit.

Mah Kong Doon v. Mah Cap Doon (Alta.), 39 D.L.R. 234, [1918] 1 W.W.R. 610, affirming 37 D.L.R. 50.

ACCOUNT — REFERENCE — RECEIVER — SECURITY—RECEIVER TO CARRY ON OR SELL BUSINESS.

Howie v. Howie, 14 O.W.N. 120.

PREMATURE DISSOLUTION—DAMAGES.

No partner has a right without cause to dissolve the partnership before expiration of the time fixed in their agreement under penalty of paying the damages which the other partner suffers. When it is a partnership for the purchase and sale of real property, where operations would have been commenced at a time when the real property had a great speculative value, and the dissolution took effect at the moment when the market was affected by a crisis brought about by the war, the amount of damages suffered by the expelled partner should be estimated by taking into consideration the facts before, as well as after the action.

Howard v. Findlay, 27 Que. K.B. 375.

ELECTION OF DOMICILE—PEREMPTION—SERVICE.

If a firm of attorneys, who had made an election of domicile, is dissolved and one of the members elects a domicile elsewhere, a motion for peremption should be served at the domicile elected by the latter, not at that elected by the partnership.

Belanger v. McDonnell, 20 Que. P.R. 48.

(§ VI—29)—SALE OF BUSINESS—ACCOUNTING—LIMITATIONS—TRUST.

Where a business has been carried on by husband and wife in equal shares as partners, the sale of the business terminates the partnership. The husband is not a trustee in the full sense of that word for the wife's share of the purchase price received by him so as to preclude the Statute of Limitations from applying. Any action for a partnership account must be brought within six years

from such receipt. [Knox v. Gye, L.R. 5 H.L. 656, applied.]

Fave v. Roumegous, 42 D.L.R. 533, 42 O.L.R. 435; 14 O.W.N. 50, varying 13 O.W.N. 251.

VII. Actions.

(§ VII — 30) — INJUNCTION — DISCONTINUANCE OF ACTION—DAMAGES.

In an action in a county Court which brought up the question of the existence of a partnership, the plaintiff obtained an injunction and then discontinued the action. The defendant applied for an order directing an inquiry as to the damages resulting from the injunction and the Judge ordered a reference to the registrar, not only to inquire and report as to damages, but also to decide whether a partnership existed. Held, per Macdonald, C.J.A., Galliher and Eberts, JJ.A., McPhillips, J.A., dissenting, that the appeal should be allowed.

John Hing Co. v. Sit Way (B.C.), [1918] 1 W.W.R. 978, 25 B.C.R. 153.

ACTION TO RECOVER DEBTS OF PARTNERSHIP FROM ALLEGED PARTNER—CLASS ACTION —RULE 75—CREDITORS.

Silks Limited v. Irons, 15 O.W.N. 267.

PASSAGEWAY.

See Easements; Railways.

PASSING-OFF.

See Patents; Trademark.

PATENTS.

See also Trademark; Trade-name.

Grants of public land, see Public Land; Mines and Minerals.

Annotations.

Construction of patents; effect of publication: 25 D.L.R. 663.

Patents on dust collecting means; vacuum cleaners: 25 D.L.R. 716.

Prima facie presumption of novelty and utility: 28 D.L.R. 243.

Novelty and invention: 27 D.L.R. 450.

New and useful combinations; public use or sale before application for patent: 28 D.L.R. 636.

Essentials of utility and novelty; process patent: 35 D.L.R. 362.

Patentable invention; new devices: 38 D.L.R. 14, 43 D.L.R. 5.

Manufacture and importation under Patent Act: 38 D.L.R. 350.

(§ I—1)—PLACE OF MANUFACTURE—ASSEMBLING OF PARTS.

A patented article made in the United States in detail, in the sizes required in accordance with specific orders, the parts merely being joined together in Canada, is not manufactured or constructed in Canada within the meaning of the Patent Act, R.S.C. 1906, ch. 69, sec. 38.

Dominion Chain Co. v. McKinnon Chain Co., 38 D.L.R. 345 (annotated), 17 Can. Ex. 255 [Affirmed by Supreme Court of Canada.]

(§ II B—15)—INVENTION—COMBINATIONS.

The application of a well-known contrivance to an analagous purpose is not invention and is not good ground for a patent.

Northern Shirt Co. v. Chester E. Clark, 38 D.L.R. 1 (annotated), 17 Can. Ex. 273, [1918] 1 W.W.R. 444. [Affirmed by Supreme Court of Canada.]

NOVELTY — INVENTION — COMBINATION — PRIOR ART—COSTS.

Where the patentee has merely adopted in the manufacture of his patented article old contrivances of a nature similar to those found in other articles of the same kind, and producing similar results, there is no invention to support the patent. The Court, taking into consideration the conduct of a defendant leading up to the action, has a discretion to deprive him of his full costs although he succeeds in the action.

Treo Company Inc. v. Dominion Corset Co., 42 D.L.R. 605 (annotated), 18 Can. Ex. 115.

OLD ELEMENTS—PATENTABLE INVENTION.

Bringing together old elements in such a way as to be useful and produce a combination which has the essentials requisite to a valid patent entitles an applicant to have patent issue, notwithstanding that each of such elements can be traced in previous patents.

Re Lavers' Heels Patent, 43 D.L.R. 1 (annotated), 18 Can. Ex. 199.

PAVEMENTS.

See Highways.

PAYMENT.

Statutory postponement of payments, see Moratorium.

Annotation.

Postponement under moratorium: 22 D.L.R. 865.

(§ I—1)—PAYMENT INTO COURT—MONEY FOUND DUE TO PLAINTIFF BY DEFENDANT —FINDING NOT SUBJECT TO APPEAL— APPEAL PENDING IN REGARD TO OTHER MATTERS—ORDER FOR PAYMENT INTO COURT—APPLICATION FOR PAYMENT OUT OF COURT.

Peppiatt v. Reeder, 15 O.W.N. 30.

(§ I—11)—LEGAL TENDER—CHEQUE.

An unmarked cheque is not legal tender and may be refused on that ground.

Ashkanase v. Darlymple, 38 D.L.R. 260, 24 Rev. de Jur. 26.

(§ III—25)—PLACE—OFFICE OF NOTARY.

Held, the deposit by defendant in the office of the notary, near plaintiff's domicile and with due notification to plaintiff, of the amount claimed by the latter, was, under the circumstances of this case, valid and legal, although such amount was made payable at plaintiff's domicile under the terms of the deed and mortgage mentioned in plaintiff's declaration.

Charlebois v. Charlebois, 24 Rev. de Jur. 575, 54 Que. S.C. 465.

(§ IV—30)—Application—Partnership.

The same person must be indebted to the same creditor for several distinct debts in order that there may be an imputation of payment. When the debt of a partnership and that of a partner are actually payable, the partner must make a statement to his co-partners of the payment he has received from the common debtor in proportion to the amount of the two debts, but if the partner has imputed it wholly upon the debt to the partnership, such imputation should, under art. 1843 C.C. (Que.), be maintained.

Lafleur v. Sarrazin, 24 Rev. de Jur. 603.

PEACE OFFICERS.

See Officers.

(§ I — 10) — Seizure — Resistance—Warrant.

A person in possession of property is not bound to relinquish it to one who assumes to act under legal process, but who has not clothed himself with proper and sufficient authority to rightfully take possession of the property in question. If the person in possession obstructs such officer in attempting a seizure of the property he is not thereby guilty of a breach of sec. 169 of the Criminal Code.

Rex v. La Vesque, 42 D.L.R. 120, 45 N.B.R. 522, 30 Can. Cr. Cas. 190.

PEDLARS.

Regulation of, see Municipal Corporations.

PENALTY.

See Contracts; Vendor and Purchaser.

PEREMPTION (QUEBEC).

Motion for — Notice — Service — Vacation.

On a motion for peremption of an action, served July 5 and returnable September 10, the proceedings as they appeared on the record were: "Issue joined by reply to plea on June 29." Neither party had inscribed for proof and hearing within the 3 days following June 29, the date of the reply to the plea (C.C.P. art. 293), so that this reply was the last proceeding on the record. Held, since the 3 days to inscribe the case (C.C.P. 293) expired in vacation (C.C.P. 15) on July 2, the delay was forcibly extended to September 2, since June 30 was the only judicial day which could count in computing the delay. Not being compelled to proceed to trial between June 30 and September 1 (C.C.P. 10) the peremption was interrupted. It could only commence on September 3, and in consequence, the defendant's motion served July 5, should be refused as premature.

Richstone v. Right, 24 Rev. de Jur. 33, 19 Que. P.R. 266.

Case inscribed and referred.

If a case is referred to a Judge, such reference is a useful proceeding which interrupts peremption.

Pinkerton v. Burns, 19 Que. P.R. 209.

Leave to file defence—Delay.

Permission to file a defence long overdue, and after an inscription for proof ex parte, implies the obligation, on the part of the defendant, of filing it the same day; if he does not do so, and the prothonotary, for this reason, refuses to receive a reply and an inscription, the defendant who filed his defence later, without the knowledge of the plaintiff, cannot, after two years have elapsed since such filing, apply for peremption of the action.

Marsil v. McDonald, 20 Que. P.R. 277.

Change of parties.

If one suing in a certain capacity is removed and replaced, and the defendant has been notified of that fact, the latter cannot, after the expiration of two years from the service of such notice, ask that the action be perempted. His duty is to proceed against the new appointee and continue the action.

Hains v. Tooke, 20 Que. P.R. 167.

Insolvency—Effect.

An abandonment of property by a defendant has not the effect of interrupting peremption of the action.

Robidoux v. Denis, 19 Que. P.R. 172.

PERFORMANCE.

See Contracts; Specific Performance; Mechanics' Liens.

PERJURY.

Annotation.

Authority to administer extra-judicial oaths: 28 D.L.R. 122.

PERSONAL INJURIES.

See Negligence; Death; Master and Servant; Railways; Street Railways; Carriers; Highways; Automobiles.

Measure of damages, see Damages.

PETITION OF RIGHT.

See Crown; Exchequer Court.

PHYSICIANS AND SURGEONS.

Fees—Tariff.

There is no tariff in existence in the province of Quebec to determine what the charges of a physician may be. In the absence of any agreement, the Court must in each case determine the fee to be paid by the patient, and, to do so, must take into consideration, not only the standing of the physician, but also the position, the earning power and the responsibilities of the patient.

Wood v. McMartin, 54 Que. S.C. 391.

PLAINTIFFS.

See Parties.

PLANS AND PLATS.

See Expropriation.

PLEADING.

I. In general.
- A. Generally; necessity; form.
- B. Verification.
- C. Definiteness; particularity.
- D. Inconsistency; repugnancy.
- E. Implication.
- F. Conclusions.
- G. Defects waived or cured; time for objections.
- H. Exhibits; profert; oyer.
- I. Particulars.
- J. Pleading laws and ordinances.
- K. Judgment on pleading.
- L. Relief under pleading.
- M. Admissions.
- N. Amendments.
- O. Supplemental pleading.
- P. Filing after default; time.
- Q. Surplusage.
- R. Withdrawal.
- S. Striking out.
- T. Dismissal.
- U. Misjoinder; multifariousness.
- V. Duplicity.

II. Declaration or complaint.
- A. Jurisdictional averments.
- B. Right or capacity to sue.
- C. Description of parties.
- D. Statement of cause generally.
- E. Negation of defence.
- F. Prayer; allegations as to damages.
- G. Averments as to ownership, title or possession.
- H. On contract liability.
- I. Allegations as to liens.
- J. For negligence.
- K. For libel or slander.
- L. For torts, injuries or nuisance.
- M. For infringement.
- N. Estates of decedents; wills; trusts.
- O. As to corporate matters.
- P. Miscellaneous.

III. Pleas and answers.
- A. In general.
- B. What must be pleaded.
- C. What may be pleaded.
- D. Sufficiency.

IV. Cross-bill.

V. Reply.

VI. Set-off; counterclaim; recoupment.

VII. Demurrer.
- A. Form.
- B. When lies.
- C. What demurrable.
- D. What questions raised by demurrer.
- E. What admitted by demurrer.
- F. Effect; practice.

Joinder of causes, see Action.

In criminal proceedings, see Criminal Law; Indictment; Summary Convictions.

Service of, see Writ and Process.

Annotations.

Objection that no cause of action shewn; defence in lieu of demurrer: 16 D.L.R. 517.

Statement of defence; specific denials and traverses: 10 D.L.R. 503.

Enemy alienage, how pleaded: 23 D.L.R. 375, 382.

Ultra vires as defence; Estoppel: 36 D. L.R.107.

I. In general.

A. Generally; form.

(§ I A—5)—Declinatory exception—Place where contract entered into—Art. 94 C.P.

Dufresne v. Dufresne, 24 Rev. de Jur. 140.

B. Verification.

(§ 1 B — 15) — Appearance—Affidavit—Vacation time—Summary judgment.

If a summary action is returnable before the commencement of the long vacation the defendant is not required to accompany his appearance with an affidavit that he has a good defence to the action; but he is obliged to plead within the delay, and if he does not do so, the plaintiff may proceed to judgment ex parte.

Roy v. St. Onge, 20 Que. P.R. 117.

F. Conclusions.

(§ I F—40)—Inscription in law.

An inscription in law which does not contain conclusions will be rejected by the Court of its own motion if the objection is not raised.

Burtner Coal Co. v. Gano Moore & Co., 19 Que. P.R. 291.

Negatory action — Adjoining owners — Dripping from roofs.

The conclusions in a negatory action, praying that the plaintiff's property "be declared free from all servitude or encumbrance as to the defendant and his property," and that the defendant be ordered to give up the works constituting the servitude complained of, are sufficient to form the basis of an executory judgment, without the necessity of claiming also the authorization to undertake such works should the defendant not attend to them. (Per Sir François Lemieux, C.J., and Letellier, J.): Neighbours, whose properties are so close to each other that the dripping water of the roofs of their houses may alternately splash back on the sides of one or the other house and deteriorate them, must comply with the local custom of putting up a common gutter for both houses in order to prevent the water from penetrating the sides of the house. One refusing to do so will not be allowed to direct a negatory action against his neighbour.

Poulin v. Houde, 53 Que. S.C. 145.

Parties.

If a party has interest in being notified of an action, he cannot complain by way of exception to the form that no conclusions have been taken against him.

Legault v. Charbonneau, 19 Que. P.R. 218.

Discontinuance — Confession of judgment—Costs.

A plaintiff may discontinue a portion of the conclusions of his declaration, even by a proceeding other than a discontinuance properly so called. It is not necessary that the

document containing such discontinuance should state that the discontinuance will be made with costs against the plaintiff. After service of a discontinuance a defendant cannot then confess judgment in accordance with that part of the conclusions which the plaintiff has discontinued.

Equitable Realty v. Roy, 20 Que. P.R. 171.

I. PARTICULARS.

(§ I I—65)—PARTICULARS—STATEMENT OF CLAIM—NEGLIGENCE—DISCOVERY.

O'Dell v. City of London, 14 O.W.N. 201.

MOTION FOR — AFFIDAVIT — NEGLIGENCE—BY-LAWS.

A motion for particulars does not need to be supported by a statement under oath. A defendant charged with negligence has a right to know the act or acts for which he is blamed. Where the negligence consists of the violation of municipal by-laws it is not necessary to point out what by-law has been violated, nor in what the violation consists.

Perrault v. Lacombe, 19 Que. P.R. 174.

LOSS OF PROFITS—TIME—COSTS.

A plaintiff suing for loss of profits cannot be compelled to shew in detail what profits could have been made or to furnish a statement of receipts and expenses upon which he made his calculations. He may, however, be compelled to state the number of days he had lost in order to complete the contract; the cost of deed which he had prepared and the amount of commissions he had to pay to procure the necessary funds to complete the sum required; but not the name of the person to whom he had paid such commission. If both parties partially succeed in their respective claims, the costs of a motion for particulars may be set off.

Brown v. Dupuis, 19 Que. P.R. 319.

CAPIAS.

Upon an application for a capias, as in all other proceedings, the party attacked has a right to demand particulars necessary to enable him to frame his defence.

Stackhouse v. Lorimer, 19 Que. P.R. 480.

N. AMENDMENTS.

(§ I N—110)—ALLEGATIONS OF FRAUD.

A plaintiff who in his pleadings carelessly alleges falsehood and fraud, on which ground the action is dismissed, there being no evidence of fraud, is not entitled to have such pleadings amended so as to give him the relief he might have been entitled to had the pleadings been properly drawn.

Twaites v. Morrison (Alta.), 43 D.L.R. 73, 14 A.L.R. 8, [1918] 3 W.W.R. 349.

AMENDMENT OF—RULE 105—APPLICATION.

Roval Bank of Canada v. Nesbitt, 40 D.L.R. 166, 13 A.L.R. 408, [1918] 1 W.W.R. 766.

AMENDMENT OF DEFENCE—WORKMEN'S COMPENSATION ACT—FAILURE TO PLEAD.

Where at the time of the bringing of an action for damages for personal injuries the defendant is aware of a claim made by the plaintiff against another party for compensation under the Workmen's Compensation Act, but does not plead election of compensation by the plaintiff, he should not be allowed to so plead by amendment at the trial where it appears that the trial might have taken an entirely different course had the defendant raised the point by his defence.

Lechiw v. Sewrey (Man.), [1918] 2 W.W.R. 386.

DEED ATTACKED ON THE GROUND OF FRAUD—FRAUD NOT FOUND AT TRIAL—DEED SET ASIDE FOR IMPROVIDENCE—AMENDMENT NOT ASKED FOR OR MADE AT TRIAL—AMENDMENT MADE BY APPELLATE COURT NUNC PRO TUNC—RULES 183, 186—COSTS.

McCartney v. McCartney, 15 O.W.N. 210.

INSCRIPTION IN LAW—EVIDENCE.

An inscription in law cannot be amended after an order has been given to furnish evidence before the inscription may be disposed of.

Labelle v. Ricard, 19 Que. P.R. 366.

OPPOSITION — NEW FACTS — AFFIDAVIT — DISMISSAL.

An opposition may be amended provided the new facts alleged are supported by an affidavit; it will not be dismissed as frivolous when on its face it invokes a title or right of ownership.

Stackhouse v. Lorimer, 19 Que. P.R. 448.

(§ I N—119)—SUBSTITUTION OF PARTIES.

The substitution of one defendant for another, without having recourse to the ordinary method of summons, will not be allowed under pretence of amendment.

Ellis v. Griale, 19 Que. P.R. 332.

P. FILING AFTER DEFAULT; TIME.

(§ I P—130)—TIME OF PLEA—ACTION FOR RENT — DECLARATION—SERVICE—FILING.

When the plaintiff, in a summary action between lessor and lessee, summons the defendant to appear within the delay of one clear day, he retains his right to correct the summons by leaving a copy of the declaration with the defendant himself or at the office of the clerk of the Court within the three days following the service of the writ. But the delay of service must be counted from the day of such filing. If the plaintiff brings his action prematurely the defendant may, on motion, demand that the delays for pleading be extended, but he cannot claim the nullity of the summons by exception to the form.

Laroche v. Poulin, 54 Que. S.C. 19, 19 Que. P.R. 433.

PRELIMINARY EXCEPTION.

The Court cannot, in any case, extend the delays for presenting a preliminary exception.

Buckley Drouin Co. v. Mayhew, 19 Que. P.R. 210.

S. Striking out.

(§ I S—145)—Statement of claim—Declaratory judgment—Question of general importance.

An action is not open to objection on the ground that a merely declaratory judgment is sought: Judicature Act, R.S.O. 1914, ch. 56, sec. 16 (b). Rule 124 (English Order XXV., rule 1) is not intended to apply to any pleading which raises a question of general importance or a serious question of law. [Dyson v. Attorney-General, [1911] 1 K.B. 410, [1912] 1 Ch. 158, followed.] The summary procedure under rule 124 can be adopted only when it can be clearly seen that the claim is, on the face of it, clearly unsustainable. [Attorney-General v. London and North Western R.W. Co., [1892] 3 Ch. 274, 277; Hubbuck & Sons v. Wilkinson Heywood & Clark, [1899] 1 Q.B. 86, followed.] Rule 145 requires that a statement of claim shall state specifically the relief claimed; and, where a declaration is claimed, the pleading should also state what action or contention on the part of the defendants has made it necessary to ask for a specific declaration. That "doubts have arisen" is not a sufficient reason for asking the Court to make a declaration. In this case, where the plaintiffs, by their statement of claim, asked for a declaration as to the "present legal effect" of a certain agreement and of a statute confirming it, in relation to the right of the plaintiffs to take water from the Niagara River for the purpose of generating electricity, it was held that the pleading, though defective, should not be struck out; and an order was made, under rule 138, for the delivery of a further and better statement of the nature of the claim.

Electrical Development Co. v. Commissioners for Queen Victoria Niagara Falls Park, 40 O.L.R. 480.

Ex parte order improperly made set aside —Rules 213, 216—Costs.

Boston Law Book Co. v. Canada Law Book Co., 15 O.W.N. 127. [See 43 O.L.R. 233.]

Defence—General denial as embarrassing — Particulars — Action against bank — Cheques — Forged endorsements.

Where a paragraph of a defence which denies each and all of the allegations contained in certain paragraphs of the statement of claim is not in compliance with rule 305 of the King's Bench rules, it is not one which should be struck out as embarrassing. Where in an action to recover the amounts of cheques issued by the plaintiff, paid by the defendant bank and charged to the plaintiff, the defence alleges that the proceeds of the cheques went to persons to whom the plaintiff owed money, and the plaintiff received credit therefor, the plaintiff is entitled to particulars of the cheques which, it is alleged, were paid to such persons and the dates and items of said indebtedness; and where the defence alleges that the endorsements, if not made by the payees, shew that they were not so made and that the plaintiffs by acknowledging, without objection, the correctness of the payments thereunder so ratified such endorsements, the plaintiff is entitled to particulars of the dates of such acknowledgements. A paragraph of a defence to such an action which sets up that the endorsements, if not made by the payee, were made by the plaintiff or its agent, or at its or his request, is in violation of rule 329 and should be struck out, but if, instead of applying to have it struck out, the plaintiff asks for particulars shewing which of said cheques are alleged to have been endorsed by the plaintiff or the plaintiff's agent, or at the request of the plaintiff or its agent, such particulars should be furnished by the bank, even though the cheques have been returned to the plaintiff by the bank; and where the defence alleges fraud, the plaintiff is entitled to particulars of such fraud; and if it is alleged that the plaintiff agreed that the bank was not to be responsible for forgeries, the plaintiff is entitled to particulars of said agreement; but where the defence alleges that all the cheques were issued to fictitious persons on fictitious transactions the plaintiff is not entitled to particulars shewing which of said cheques are alleged to have been payable to fictitious persons, and what transactions are alleged to have been fictitious.

Dominion Elevator Co. v. Union Bank (Man.), [1918] 3 W.W.R. 979.

Extraneous allegations — Contract — Fraud of school commissioners.

In a plea by a building contractor to an action for repairs of works done by him on a school house, as also in his reply to the plea he cannot allege facts shewing that the work has not been accepted owing to the fraudulent scheming of the school commissioners, to whom he had refused to pay bonuses. Such allegations may be struck out on inscription in law.

Pion v. Les Commissaires d'Ecoles St. Stanislas, 24 Rev. Leg. 397, affirming 19 Que. P.R. 3.

Irrelevant matter.

An allegation of irrelevant facts and conclusions asking that those facts be simply declared as proven, shall be struck out on inscription in law.

Goodwins Ltd. v. Brosseau, 19 Que. P.R. 295.

Allegations as to reputation.

An admission of the good reputation of the plaintiff must not be followed by a correction "but she has the reputation of being a wrangler with all her neighbours"; these words will be struck out on an inscription in law.

Peloquin v. Plante, 20 Que. P.R. 237.

Declinatory exception—Defendant outside province—Costs.

If several causes of action are joined in an

action against a defendant having his domicile outside of the province of Quebec, and on whom the action has been served outside of that province, a declinatory exception asking the dismissal of the action in toto being made, the items which have not arisen in that province shall not be struck out. In such case the costs on the declinatory exception shall be compensated.

Montreal Abattoirs Ltd. v. Colwell, 19 Que. P.R. 26.

ACTION FOR PROFESSIONAL SERVICES—CONCLUSIONS OF PLEA.

A plea in an action for professional services, with a conclusion praying "to determine the amount to which the plaintiffs are entitled, and that their action be dismissed with costs," will not be struck out on motion.

Pelissier v. Primeau, 19 Que. P.R. 327.

II. Declaration or complaint.

D. STATEMENT OF CAUSE GENERALLY.

(§ II D—185)—SUFFICIENCY OF ALLEGATIONS —NOTE—PRESCRIPTION — AMENDMENT.

An omission to state, in a declaration, that the note sued on was signed or endorsed by the defendant is not in itself fatal. It may be replaced by other words implying the same meaning. The form indicated in the Code of Procedure is not essential. When a plaintiff asks judgment against the defendant on a note which he produces, without saying that the note is signed or endorsed by the defendant, he makes an imperfect and insufficiently detailed statement; but it cannot be said, in such a case, that there is an absolute omission of an essential statement. The rule is that when an essential statement is totally lacking, the proceedings must be attacked by inscription in law; when the essential statement is not lacking, but is insufficiently particularised, the proceedings must be attacked by an exception to form. When an essential statement is not lacking, but is defective in not saying whether the defendants signed or endorsed the notes, such informality may always be covered by an amendment, an allegation of payment on account shews in itself a legal connection. The insufficiency of the allegations in the declaration might have been connected by the amendment allowed, and thus would have taken effect from the institution of the action.

Gauthier v. Lowe, 24 Rev. de Jur. 354.

STATEMENT OF CLAIM—ALLEGATION MADE BY CREDITOR OF COMPANY AGAINST DIRECTORS—WRONGFUL DEALING WITH BONDS OF COMPANY — CLAIM MAINTAINABLE ONLY BY COMPANY—STRIKING OUT ALLEGATION AND CLAIM FOR RELIEF—PLEADING OF DIRECTORS IN DENIAL AND ASSERTION OF PROPER DEALING—LEAVE TO WITHDRAW.

Canada Wire and Cable Co. Limited v. Grant, 14 O.W.N. 79.

III. Pleas and answers.

A. IN GENERAL.

(§ III A—300)—PLEA TO LIEN ACTION—PARTICULARS—VALUE OF WORK—CONCLUSIONS.

In an action in declaration of privilege, a plea which does not conclude to the nullity of such privilege, but only asks its radiation, is irregular, and such conclusions will be dismissed on motion as being conclusions of a main action or of a cross-demand. A defendant who pleads to an action in declaration of privilege that such privilege is illegal must shew in what such illegality consists. If he claims that the plaintiff's works are worth only a portion of the amount for which a privilege has been registered, he must state in what those works consist.

Angrignon v. Mailloux, 19 Que. P.R. 377.

(§ III A—303)—CORPORATION—DENIAL OF AUTHORITY TO SIGN NOTE—AFFIDAVIT.

A corporation sued on a note and pleading that the note was not authorized by it, ought to follow its denial with an affidavit, without which the allegation will be struck out on motion.

Hayes v. Town of Montreal North, 19 Que. P.R. 216.

(§ III A—304)—PUIS DARREIN CONTINUANCE.

The new facts which a defendant may plead by his defence and the plaintiff by his reply, under art. 198 C.C.P., must be facts which arose before the commencement of the action, but which the declaration or the defence, as the case may be, does not refer to; they must be so pertinent to and connected with the cause that one party or the other can join issue by a general reply. A supplementary defence and a supplementary answer are each subject to the following conditions and formalities: (a) It can only be pleaded with the permission of the Court; (b) that the facts pleaded are material; (c) that the facts arose since issue joined; (d) that the application to plead be supported with the affidavit required by rule 47 of the Superior Court; (e) that the application is made before final judgment, or before the verdict in case of a jury trial.

Mercure v. Munsey, 19 Que. P.R. 182.

C. WHAT MAY BE PLEADED.

(§ III C—320)—PLEA OF COMPENSATION—DAMAGES.

Where a debtor, sued for an account, not being allowed to set up compensation by a claim for damages, a plea by which he admits the account, pleads his said claim and a cross-demand with which he follows this plea, then prays that compensation may be ordered between the said account and the damages ascertained by the judgment upon his own claim, has no legal foundation (C.C.P., art. 196).

Kaswan v. Solin, 24 Rev. de Jur. 226.

POSSESSORY ACTION—TITLE—POSSESSION—BOUNDARY.

In written pleadings the Court ought rather

to go according to the intention of the person who has pleaded rather than the literal meaning of the words employed by him. The defendant in a possessory action may plead reasons tending to establish his right of property, and even allege that he is not only the possessor but also the owner of the land, for the purpose of rejecting the action, as he can invoke his title to the property in order to determine the nature and the quality of his possession and the applicability of art. 2200 C.C. (Que.). Where there is at least a doubt as to the delimitation of neighbouring and contiguous properties, it is necessary to have recourse to an action in bornage and not to a possessory action.

Bourbonnais v. Denis, 53 Que. S.C. 286.

D. Sufficiency.

(§ III D—325)—Dog Tax and Sheep Protection Act—Statement of claim.

A statement of claim which alleges that within the time mentioned in sec, 18 of the Dog Tax and Sheep Protection Act (R.S.O. 1914, ch. 246), the plaintiff applied to the council for compensation and satisfied the council that he had made diligent search and inquiry to ascertain the owner or keeper of the dog, "without result," sufficiently states a cause of action for a mandamus requiring the council to award compensation. [Re Hogan v. Township of Tudor (1915), 34 O.L.R. 571, distinguished.]

Noble v. Township of Esquesing, 41 D.L.R. 99, 41 O.L.R. 400.

(§ III D—333)—Crown grants—Attacking—Right to have attorney-general added as a party—Action by—Petition of right.

E. & N. Railway Co. v. Dunlop (B.C.), 41 D.L.R. 737. [See [1918] 3 W.W.R. 645, 828.]

IV. Cross-bill.

(See previous Annual Digests.)

V. Reply.

(§ V—345)—Special reply.

A defendant cannot reply specially without the permission of a Judge.

Brentwood Realty Co. v. Surveyor, 19 Que. P.R. 340.

Action against school commission—Contract.

A contractor, who sues a school commission for work done, cannot allege in reply to a plea that if he has not been paid it is because he has refused to submit to the demands of certain commissioners.

Pion v. St. Stanislas de Montreal School Commission, 19 Que. P.R. 3, affirmed in 24 Rev. Leg. 397.

VI. Set-off; counterclaim; recoupment.

(§ VI—355)—Counterclaim—Denial—Waiver.

The necessity, under the practice rules, of pleading a denial to a counterclaim, failure of which operates as an admission of the allegations therein, except as to damages, will be deemed waived, if the defendant, without objection, proceeds to trial and offers evidence to substantiate the counterclaim. [Kerr v. Burns, 9 N.B.R. 604, distinguished.]

Dunham v. Marsden, 38 D.L.R. 24, 45 N.B.R. 279.

VII. Demurrer.

(§ VII—360)—Inscription in law.

Although art. 1144 C.C.P. (Que.) states that in cases not appealable from the circuit Court issues of the law are raised by demurrer, the Court, for reasons which it believes just, can consider the inscription in law as equivalent to a demurrer.

Goupil v. Van, 24 Rev. Leg. 192.

PLEDGE.

Security to banks, see Banks.

Action by pawnbroker to recover value of article pledged to him and taken by police—Article in custodia legis—Unnecessary action—Costs.

Samuels v. Dominion Bank, 15 O.W.N. 219.

Sale—Security for debt—Possession.

A sale of movables, with no other intention than to guarantee the debt of the purchaser, is only a contract of pledge; and if the vendor remains in possession of the movables the purchaser has no lien upon them as under the Quebec law movables are not subject to hypothecation.

Champagne v. Jackson, 54 Que. S.C. 388.

POLICE MAGISTRATE.

See Justice of the Peace; Summary Convictions; Criminal Law.

POLICY.

See Insurance.

POSSESSION.

See Adverse Possession.

Under chattel mortgage, see Chattel Mortgage; Bills of Sale.

POUNDAGE.

See Sheriff.

POWERS.

Under wills, see Wills; Executors and Administrators.

Sale by mortgagee under power of sale, see Mortgage; Chattel Mortgage.

(§ II—8)—Of attorney—Conflict of laws.

A power of attorney executed in a foreign country to be acted upon in Quebec, is not invalid because of non-observance of the forms required by the law of the place of execution if it is valid under the Quebec law.

San Martin Mining Co. v. Ingeniera Importadora Y. Contratista Co., 43 D.L.R. 322, 27 Que. K.B. 527.

PRACTICE; PROCEDURE.

See Pleading; Writ and Process; Parties; Discovery; Trial; Jury; New Trial; Appeal;

Costs; Judgment; Execution; Stay of Proceedings.

As to criminal proceedings, see Criminal Law; Summary Convictions; Certiorari; Habeas Corpus.

Insolvency, winding-up see Insolvency; Assignment for Creditors; Companies, VI.

See also Attachment; Garnishment; Interpleader; Mandamus; Injunction.

PREFERENCES.

See Fraudulent Conveyances; Assignment for Creditors; Companies, VI.

PRELIMINARY ENQUIRY.

See Criminal Law, II; Justice of the Peace; Summary Convictions.

PRESCRIPTION.

See Limitation of Actions; Adverse Possession; Easements.

PRESENTATION.

For payment, see Bills and Notes.

PRESUMPTIONS.

Presumption and burden of proof, see Evidence, II.

PRINCIPAL AND AGENT.

I. The relation; revocation.
II. Agent's authority; rights and liabilities of principal.
  A. In general.
  B. Agent's purchase or sale on credit.
  C. Agent's fraud or wrong.
  D. Ratification.
III. Rights and liabilities of agent.

Annotations.

Holding out as ostensible agent; ratification and estoppel: 1 D.L.R. 149.

Signature to contract followed by words shewing the signing party to be an agent; Statute of Frauds: 2 D.L.R. 99.

Fraud of agent or employee; estoppel by conduct: 21 D.L.R. 13.

Effect of war on agency of alien enemy; 23 D.L.R. 375, 380.

I. The relation.

See Brokers; Companies; Carriers; Partnership; Insurance.

II. Agent's authority; rights and liabilities of principal.

A. In general.

(§ II A—6)—Fraud—Innocent third parties.

An owner of property, who intrusts an agent with all the indicia of title with instructions to borrow a certain sum, cannot redeem the securities without paying a bonâ fide lender all he has lent on the property, although the agent has fraudulently borrowed in excess of the instructions and misappropriated the amount borrowed.

Mahan v. Manness, 40 D.L.R. 136, 28 Man. L.R. 470, [1918] 2 W.W.R. 191.

Power of attorney—To purchase—Mortgage.

A transaction whereby an agent purchased land for cash on behalf of his principal and subsequently gave a mortgage on said land and a conveyance of other lands in satisfaction of the amount remaining unpaid, held to have been authorized by the agent's power of attorney. [McKee v. Philip (1916), 38 D.L.R. 731, 55 Can. S.C.R. 286, distinguished.] Per Martin, McPhillips and Eberts, JJ.A., Macdonald, C.J.A., dissenting, held that the mortgage was part of the original transaction and that the agent had exceeded his powers.

Dinsmore v. Philip (B.C.), [1918] 3 W.W.R. 457, reversing [1918] 1 W.W.R. 405.

Sale of goods—Action for damages for non-delivery — Contract — Authority of agents—Ratification.

Walmsley v. Hyatt, 14 O.W.N. 16, affirming 12 O.W.N. 412.

Purchase of property by agent for principal — Evidence — Declaration —Conveyance — Damages — Adjustment of account—Costs.

Duggan v. McCauley, 15 O.W.N. 128.

(§ II A—7a)—Authority to purchase land —Scope—Minerals—Rescission.

An agent authorized to purchase land cannot bind his principal to an agreement for the purchase of land minus the coal and minerals therein, and the principal has the right to rescind the agreement as being beyond the scope of the agency; it is not open to the vendor, where he has entered the agreement as principal, to allege that the moneys thereunder were paid to him in the character of agent only.

Franco-Canadian Mortgage Co. v. Greig and Thirlaway, 38 D.L.R. 109, 55 Can. S.C.R. 395, affirming 29 D.L.R. 260, 10 A.L.R. 44, which reversed 23 D.L.R. 860. [Leave to appeal to Privy Council refused.]

(§ II A—8)—Sale of land—Purchase by agent.

The purchase by an agent, of land he was authorized to sell, without the knowledge of the principal, can only be attacked by the principal; it is no defence to an action of ejectment.

Palmason v. Kjernested, 39 D.L.R. 237, 28 Man. L.R. 429, [1918] 1 W.W.R. 607, affirming 36 D.L.R. 448.

Conflict of duty—Trustee—Agent for purchaser.

A trustee for the sale of land is not competent to purchase the trust property as agent for a stranger; if the principal repudiates the purchase as soon as the facts come to his knowledge he is entitled to rescission of the contract.

Stahl v. Miller, 40 D.L.R. 388, 56 Can. S.C.R. 312, [1918] 2 W.W.R. 197, reversing 37 D.L.R. 514, 24 B.C.R. 490.

UNAUTHORIZED PURCHASE OF LAND—RECOVERY OF MONEY PAID—EVIDENCE—RECEIPT.

McKee v. Philip, 38 D.L.R. 731, 55 Can. S.C.R. 286.

AGREEMENT FOR SALE OF LAND—AUTHORITY OF AGENT OF VENDOR—STATUTE OF FRAUDS—SPECIFIC PERFORMANCE—DISCRETION.

Hetting v. Sneeth, 14 O.W.N. 326, affirmed in 15 O.W.N. 162.

EXTENSION OF MANDATE—EVIDENCE—PRESUMPTION.

Under Quebec law, proof by presumption is admitted without restriction; it is admitted, even in a case where parol evidence is not allowed. Even after the mandate of a real estate agent for the sale of a property has expired, an extension of such mandate may be inferred under the following circumstances, considered together: (a) When three months after the delay granted to make the sale the agent transmits to the principal an offer which the latter accepts without making any remark, and that he holds this offer for two months and keeps complete silence; (b) when, after the two months, he calls upon his agent to get the deed signed within three days, otherwise he will consider the transaction as null and void, and (c) when the deed of sale is signed by the parties within such delay. In such circumstances the agent, who sues by virtue of his mandate, is entitled to the commission agreed upon.

Parent v. Mendelsohn, 27 Que. K.B. 226.

AGENT EXCEEDING AUTHORITY—LIABILITY OF PRINCIPAL—SALE.

A joint stock company is only bound by the acts of its agents if such acts have been expressly authorized or ratified by it, or if they are connected with the purposes of its undertaking. So a company which speculates exclusively in the purchase and sale of land, without being engaged in building, cannot be made to pay for the price of construction material bought in the name of the company by one of its agents for the benefit and advantage of third persons.

Blais v. Quebec Realty Co., 27 Que. K.B. 218.

(§ II A—12)—UNDISCLOSED PRINCIPAL—JUDGMENT—SETTING ASIDE.

A judgment against an undisclosed principal will be set aside where there is no evidence connecting him with the contract.

Nova Scotia Dredging Co. v. Musgrave & Co., 40 D.L.R. 589, 52 N.S.R. 71.

C. AGENT'S FRAUD OR WRONG.

(§ II C—20)—REAL ESTATE AGENT—OPTION—FRAUD.

Mignault v. Desjardins, 39 D.L.R. 400, 55 Can. S.C.R. 618, affirming 23 Rev. Leg. 85.

AGENT RETAINING PROPERTY INSTRUCTED TO EXCHANGE.

An agent who is instructed by his principal to arrange for him the exchange of an automobile valued at $2,000 for real estate, commits an illegal act, if, in so effecting the exchange, he represents to his principal that the price asked for the real estate is $2,000 in excess of the one really demanded by the owner of such real estate. Under the evidence plaintiff in this case is entitled to judgment against defendant for $1,500.

Duranceau v. Cote, 24 Rev. de Jur. 78.

D. RATIFICATION.

(§ II D—26)—ACT WITHOUT AUTHORITY—KNOWLEDGE.

In order that a person may be deemed to have ratified an act done without his authority, it is necessary that at the time of the ratification he should have full knowledge of all the material circumstances under which the act was done, unless he intends to ratify the act and take the risk whatever the circumstances may have been.

Wheeler v. Hisey, 43 D.L.R. 92, 42 O.L.R. 654.

OSTENSIBLE AGENT—ESTOPPEL—JUDGMENT—SATISFACTION.

In considering whether a person is bound by acts of an ostensible agent which are alleged to have been ratified, the distinction is to be observed between a ratification to be implied from conduct shewing an intention to ratify and an estoppel to deny ratification, the case, that is, where, without a conscious intention to ratify, the so-called principal is estopped from denying that his conduct must be treated as a ratification (per Beck, J., Stuart, J., concurring). In an action for a declaration that a judgment obtained by the defendant against the plaintiff had been satisfied, held that there was evidence to justify the jury in finding that there was an arrangement made between the plaintiff and the defendant's ostensible agent whereunder goods were handed over to the defendant in satisfaction of the judgment and that the agent's act had been ratified, or adopted by estoppel, by the defendant.

McKay v. Tudhope Anderson Co. (Alta.), [1918] 3 W.W.R. 994, 44 D.L.R. 100.

III. Rights and liabilities of agent.

(§ III—30)—SALE OF LAND—FRAUD—LIABILITY OF AGENT—CONCEALMENT—RESCISSION.

Clark v. Hepworth, 39 D.L.R. 395, 55 Can. S.C.R. 614, [1918] 1 W.W.R. 147, affirming 34 D.L.R. 177, 10 A.L.R. 465.

(§ III—32)—CONTRACT—PERSONAL LIABILITY.

Where the terms of a contract clearly indicate that an agent making the contract is to be personally liable, he is bound by the contract, regardless of his own intention, unless it can be shewn by extrinsic evidence that there was an express agreement that the agent should not be liable, and that the contract rendering him liable was so drawn by mistake. [Wake v. Harrop, 6 H. & N. 768, followed.]

Currie v. Rur. Mun. of Wreford, 38 D.L.R.

516, 11 S.L.R. 22, [1918] 1 W.W.R. 315, reversing 10 S.L.R. 117.

(§ III—36)—Commissions on sales.

Employing an agent to sell and naming a price, but not limiting the sale to that price, constitutes a general employment, and if a sale be made to a purchaser introduced by such agent the latter will be entitled to a commission, though the sale price be less than that first named. [Bridgman v. Hepburn, 42 Can. S.C.R. 228, distinguished.]

Prentice v. Merrick, 38 D.L.R. 388, 24 B.C.R. 432.

Commissions—Sales "secured."

An agent under an agreement whereby he is to receive a commission "on each accepted and filled sale . . . which he has secured either with or without the traveller's assistance" is not entitled to a commission for simply introducing a prospective purchaser to the travelling agent and doing nothing further to promote the sale.

Law and McLean v. Sawyer-Massey, 39 D.L.R. 547, 13 A.L.R. 126, [1918] 1 W.W.R. 727, affirming 38 D.L.R. 333.

Commission on sale of secret process—Contract—Liability—Joint obligation to two agents—Release by one—Effect of—Judgment—Declarations—Payment of moiety of commission to one agent—Recital in judgment—Reference unnecessary—Costs—Appeal.

Whyte v. Henderson, 13 O.W.N. 460.

Agent's commission on sale of goods—Commission on basis of difference between sale price to agent and price to purchaser—Increase in price to agent—Application to particular sales—Evidence—Finding of fact of trial Judge—Appeal.

Pringle v. Wisconsin Electric Co., 15 O.W.N. 17.

Agent's commission on sale of goods—Commission confined to goods actually delivered—Failure to prove substituted contract—Findings of fact of trial Judge—Appeal.

Forbes v. Lumbers, 15 O.W.N. 133.

Agent's commission on sale of goods—Travelling salesman—Agency agreement—Construction—Commission on orders from persons in salesman's territory—Order from person from whom previous order obtained by salesman—Evidence—Findings—Appeal.

Meade v. George McLagan Furniture Co., 15 O.W.N. 183.

Commission—Sale of land—Efficient cause.

Where a person discovers that another is considering the purchase of a certain piece of land and then ascertains from the owner that he will sell and pay a commission, but does not afterwards communicate with the prospective buyer, and the latter and the owner complete the sale themselves, there is no commission payable by the owner. [Burchell v. Gowrie and Blockhouse Collieries, [1910] A.C. 614, applied.]

Langton v. Nicholson (Sask.), [1918] 1 W.W.R. 908.

Commission—Listing agreement—Sale by vendor—Memorandum of agency.

Where land is listed with a real estate agent for sale and is afterwards sold by the vendor directly to a purchaser introduced by the agent, the latter is entitled to his commission, even though the terms of sale given in the listing as the basis on which the agent is to negotiate, are not strictly adhered to. [George v. Howard. 16 D.L.R. 468, 49 Can. S.C.R. 75, followed; Herron v. Como, 16 D.L.R. 234, 49 Can. S.C.R. 1, distinguished.] It is merely the terms of the agency agreement, whether they be meagre or detailed, that must be in writing under ch. 27, 1906. Once they are evidenced by writing the meaning thereof is just as subject to interpretation as if they had been evidenced only by oral testimony. The price and the other terms of the proposed sale may or may not be mentioned. If they are, in the circumstances, an essential part of the agency agreement they ought to be in writing. But it is a question of interpretation, even since the statute, whether the terms mentioned as those of the proposed sale are intended merely as a basis on which the agent may negotiate or are intended to bind the agent strictly to a sale on the named terms before he can claim his commission. The parties to the sale, and the land and terms of sale are not necessarily part of an agency agreement at all, and, therefore, unless they are made such need not be in writing.

King v. Schon (Alta.), [1918] 3 W.W.R. 892, 44 D.L.R. 111, 14 A.L.R. 79.

Sale of land—Deposit retained as commission—Right to recover—Form of action.

Where a vendor has agreed to pay a commission to his agent and has agreed that the amount received by the agent as a deposit from the purchaser should be retained by the agent in part payment of such commission, and has given security for the balance, the deposit must be treated as paid over to the vendor, it is no longer in the agent's hands qua deposit, and in an action for money had and received it is only from the vendor that it can be recovered [Bamford v. Shuttleworth, 11 Ad. & El. 926, followed]. It may, however, where the circumstances support such an action, be recovered from the agent in an action for deceit.

Brunstetter v. Zushing (Alta.), [1918] 3 W.W.R. 546 14 A.L.R. 66.

Commissions—Quebec.

In a business affair a mandate is not presumed to be gratuitous; on the contrary, according to recognised usage, a business

agency carries with it a remuneration in the form of a commission, even when none has been agreed upon.

Juneau v. Took, 54 Que. S.C. 291.

COMMISSIONS—EVIDENCE—LOST DOCUMENT.

Where papers are destroyed or not produced, unless full and satisfactory explanation is given, the Court ought to draw a conclusion unfavourable to the person who destroys and who does not produce essential papers. In this case defendant did not make any satisfactory evidence that there was an impossibility to produce the option which he contended contained a limitation of authority to sell, or that he had searched for such option and could not find it. Under the circumstances, defendant has not established that the sale was not effected within the date of the option, and plaintiff is thereafter entitled to his commission under the terms of the agreement, and the judgment must be confirmed.

Ingley v. Routhier, 24 Rev. de Jur. 342.

COMMISSIONS—DELAY.

When a vendor agrees to pay a fixed commission to a real estate agent if he sells the property within a certain time, the agent can claim nothing if he finds a purchaser who is unable or refuses to purchase the property, and there being no fault on the part of the vendor.

La Communauté des Sœurs de la Charité de L'Hopital Général de Montréal v. Colonial Real Estate Co., 27 Que. K.B. 433, affirmed 57 Can. S.C.R. 585.

COMMISSIONS—CONSIDERATION — ILLEGALITY—ACTING FOR BOTH PARTIES.

No one can be the paid agent of two persons whose interests are opposed, such as vendor and purchaser, or two persons who are exchanging. In such case, if the purchaser or one of those exchanging has promised to pay the agent a commission, knowing that the latter represents the other party also, the contract is immoral and void. A real estate agent who, entrusted by one person to sell vacant lots, receives from another an offer to exchange a property for such lots, does nothing which he should be paid for if he merely transmits the latter proposition to his first principal; and if the one who offered to exchange promised in writing to pay the agent a commission, the contract is void, as having no consideration. One who offers to sell or exchange a piece of real property, and who is rendered unable to fulfil his obligation by the fact that he has been compelled, by the judgment of a Court, to reconvey the property, cannot be responsible to the real estate agent, whom he had employed for damages representing his commission. (Per Sir Horace Archambeault, C.J.): If two parties agree to make an illegal contract neither of them has, on this point, a right of action. In such a case Courts ought to refuse their protection to either party. They cannot even allow an action for the recovery of money paid by mistake on the execution of the agreement.

Aubut v. Gareau, 27 Que. K.B. 474.

COMMISSIONS—DEFECT IN TITLE.

A borrower who agrees to pay an agent a commission of 2%, if this latter procures him a loan, is bound to pay him this commission if the loan has fallen through by reason of defects in the borrower's titles.

Johnson v. Regent Construction Co., 53 Que. S.C. 463, reversing 37 D.L.R. 790.

(§ III—41) — CUSTOMS BROKER — NEGLIGENCE.

A customs broker, who is requested by a client to clear and deliver a machine from the Customs House to the latter's building, acts as the agent of the client in procuring a carter and is not liable for such carter's negligence.

Leithead v. Doucet, 42 D.L.R. 514, 54 Que. S.C. 307.

PRINCIPAL AND SURETY.

I. SURETYSHIP; LIABILITIES OF SURETY.
A. In general.
B. Release or discharge.
II. RIGHTS AND REMEDIES OF SURETY.

I. Suretyship; liabilities of surety.

A. IN GENERAL.

See also Guaranty; Bonds; Bills and Notes.

(§ I A—1)—QUEBEC PRACTICE—RIGHT TO SUE—DEFAULT.

A surety, who invokes the benefit of the exception of discussion, must indicate to the creditor the effects he must discuss, and advance him the necessary money for that purpose. He must further invoke that benefit by way of dilatory exception. A creditor has the right to sue the surety, without putting him in default, when the principal debtor does not fulfil his obligation.

Richard Young Co. v. Brodeur, 54 Que. S.C. 486.

B. RELEASE OR DISCHARGE.

(§ I B—12)—EXTENSION OF TIME.

A surety is released by an agreement between the creditor and the principal debtor for an increased rate of interest during an extended period granted for payment, notwithstanding the surety's prior express consent to an extension simply at the will of the creditor and the principal debtor.

General Financial Corporation v. LeJeune, 39 D.L.R. 33, 11 S.L.R. 38, [1918] 1 W.W.R. 372.

(§ I B—14)—BUILDING CONTRACT—ALTERATION—NON-DISCLOSURE—DISCHARGE OF SURETY.

Ferrara v. National Surety Co., 39 D.L.R. 175 reversing 27 D.L.R. 518, 23 B.C.R. 15.

II. Rights and remedies of surety.

(§ II—15)—GUARANTEE TO BANK—DEFENCES.

One who freely and voluntarily enters into guarantees and a collateral agreement with a bank, the bank acting upon them to its detriment, cannot set up the defence that he did

not intend to undertake the liability shewn to exist, and that he would not have entered into the guarantees if he had known the true state of the accounts.

Bank of Hamilton v. Bamfield (B.C.), 40 D.L.R. 482, [1918] 2 W.W.R. 953.

PRIORITIES.

See Mechanics' Liens; Assignments for Creditors; Companies, VI; Execution; Levy and Seizure; Attachment; Garnishment; Interpleader.

PRIVATE INTERNATIONAL LAW.

See Conflict of Laws.

PRIVILEGE.

See Liens.

PRIVY COUNCIL.

See Appeal.

PRIZE COURT.

TRANSFER OF CAUSE.

By virtue of the provisions of the Imperial Prize Courts Act, 1915, ch. 57, a Canadian Prize Court will order, at the instance of the Crown, the transfer of a prize case to an English Prize Court for the purpose of the more convenient conduct of the proceedings.

Re The "Hocking," 17 Can. Ex. 226.

PRIZE—CARGO—PLEADINGS.

Where parties appear and make claim to a cargo seized as a prize, the claimants are to commence their action by a petition or statement of claim, in the form of pleadings, to which the Crown pleads by what is technically called under the rules an answer.

Re The "Sandefjord," 17 Can. Ex. 238.

PRIZE—APPRAISEMENT—SHIP—COAL.

In appraising a ship brought in as a prize the coal in the bunkers is not to be appraised as part of the ship; it should be inventoried separately. Where the appraisers have acted in good faith the Court will not interfere with their judgment.

Re The "Hamborn (No. 1), 17 Can. Ex. 243.

PRIZE—SHIP AND APPURTENANCES—COAL.

Bunker coal does not pass as part of a ship brought in as a prize.

Re The "Hamborn" (No. 2), 17 Can. Ex. 250.

PRIZE FIGHTING.

Annotations.

Criminal law; sparring matches distinguished from prize fights: 12 D.L.R. 786, 21 Can. Cr. Cas. 395.

Definition; Cr. Code (1906), secs. 105-108: 12 D.L.R. 786.

PROBABLE CAUSE.

See Malicious Prosecution; False Imprisonment; Arrest.

PROBATE.

See Wills; Executors and Administrators.

PROCESS.

See Writ and Process.

PRODUCTION OF DOCUMENTS.

See Discovery; Evidence.

PROFITS.

Compensation for loss of, see Damages.

PROHIBITION.

(§ I—1)—DENTAL COLLEGE.

The "Board of Governors" of the College of Dental Surgeons of the Province of Quebec is not a body politic, but being charged with making rules respecting the honour, dignity and discipline of the members of the College, and of deciding upon charges brought against them, it is an inferior tribunal subject to a writ of prohibition. Although a writ of prohibition has the same object in view as a writ of injunction, it differs from it, however, in that the latter should be addressed to the litigant parties, whilst the former is addressed to the Court itself.

Maillet v. Board of Governors of Quebec College of Dental Surgeons, 27 Que. K.B. 364.

(§ II—5)—OTHER REMEDY.

The writ of prohibition is confined in cases where no other remedy exists.

Henry Morgan Co. v. City of Montreal, 24 Rev. Leg. 486.

(§ V—26)—PARTIES—NOTICE—ATTORNEY-GENERAL.

A defendant or party added in a case of prohibition cannot inscribe a case unless all the other parties added in the case have pleaded in the action, or are in default in doing so. If an application for prohibition is based on the unconstitutionality of a Dominion Act, and the Attorney-General of Quebec has not been made a party to the proceedings, the Court cannot, on an application by the person applying for the writ to annul the placing of the case on the roll, decide whether or not the Attorney-General of Quebec should be added as a party. Semble, that an inscription should be served on the opposite party. The date of the hearing of a case before its turn cannot be fixed ex parte without notice to the adverse party and unknown to him.

Mongeau v. St. Cyr, 19 Que. P.R. 382.

PROMISSORY NOTES.

See Bills and Notes.

PROOF OF LOSS.

See Insurance.

PROSTITUTION.

See Disorderly House.

PROXIMATE CAUSE.

See Negligence.

PUBLIC CONTRACTS.

See Contracts, VII; Municipal Corporations, II; Crown.

PUBLIC HEALTH.

See Health; Nuisance.

PUBLIC IMPROVEMENTS.

Assessment for, see Taxes; Municipal Corporations.

(§ IV—65)— EXPROPRIATION—RIPARIAN RIGHTS — FLOODING — DAM — PUBLIC WORK—NEGLIGENCE.

Where there has been no expropriation by the Crown of any easement to flood the land of a riparian owner, the injury or damage suffered by the latter from flooding, as a result of the construction of a dam by the Crown, is not actionable under the provisions of the Expropriation Act. Nor is it actionable under secs. 19 or 20 of the Exchequer Court Act; the land being situate over 50 miles from the dam, cannot be regarded as "on a public work," and no evidence being adduced that the injury resulted from the negligence of an officer or servant of the Crown acting within the scope of his duties or employment.

Poisson v. The King, 41 D.L.R. 212, 17 Can. Ex. 371.

PUBLIC LANDS.

I. CANADA.
A. In general.
B. Disposal through land department; entry; sale.
C. Patents.
II. OF THE PROVINCES.

Annotation.

Escheat, provincial and Dominion rights: 26 D.L.R. 137.

I. Canada.

B. DISPOSAL THROUGH LAND DEPARTMENT; ENTRY; SALE.

(§ I B—5)—DEADMAN'S ISLAND—LEASE—AUTHORITY OF MINISTER.

Deadman's Island, in the harbour of Vancouver, is the property of the Crown in the right of the Dominion of Canada. An order-in-council authorising the Minister of Militia and Defence to lease that island for a term of years does not carry with it the authority to vary its terms by providing for a right of perpetual renewal. In the absence of an order-in-council authorising such variation, the action of the Minister in doing so is null and of no effect.

The King v. Vancouver Lumber Co., 41 D.L.R. 617, 17 Can. Ex. 329. [Affirmed by Supreme Court of Canada; appealed to Privy Council. See British American Fish Co. v. The King, 44 D.L.R. 750.]

C. PATENTS.

(§ I C—15)—CONSTRUCTION OF.

A Crown grant must be construed most strictly against the grantee and most beneficially for the Crown, so that nothing will pass to the grantee but by clear and express words.

The King v. Bonhomme, 38 D.L.R. 647, 16 Can. Ex. 437.

HOMESTEAD — ABANDONMENT — MISREPRESENTATION—SUBSEQUENT PATENT—ESTOPPEL.

The cancellation of a homestead entry by the Crown, brought about by the false statements of the entrant in his declaration of abandonment, will estop him from attacking a patent to the land subsequently issued by the Crown in good faith.

Attorney-General of Canada v. Massinghill, 17 Can. Ex. 510.

HOMESTEAD — ASSIGNMENT — ADMINISTRATOR—DOMINION LANDS ACT.

An agreement between the administrator of an estate and the beneficiary thereof that the former may take as his own an unpatented homestead left by the deceased is not "an assignment or transfer or an agreement to assign or transfer" within the meaning of sec. 142, the Dominion Lands Act, R.S.C. 1906, ch. 142.

Western Trust Co. v. Olson, [1918] 3 W.W.R. 811, 11 S L.R. 418.

INDIAN RESERVE — SURRENDER — TRUST — DOMINION AND PROVINCIAL POWERS.

The surrender made by the Abenaquis Indians of the Coleraine Reserve, on February 14, 1882, in favour of the Dominion Government, and accepted by it, by an order-in-council of April 3, 1882, is not an abandonment pure and simple, but a trust, by virtue of which the Dominion Government obtained the right to sell these lands for the benefit of the Indians of that reserve. The Dominion Government could legally dispose of these lands by the issue of letters patent, and confer a good title on the patentee. The Provincial Government has not acquired any right in those lands by reason of that surrender.

Gouin v. Thompson, 24 Rev. Leg. 271.

DOMINION GRANT—LEASE FROM PROVINCE—COAL RIGHTS — TRESPASS — SETTLEMENT ACT — EVIDENCE — PARTIES — ATTORNEY-GENERAL.

In an action for trespass involving a conflict between a grant in fee simple from the Crown, represented by the Government of Canada, of certain lands and the minerals thereunder and a subsequent lease from the Crown, represented by the Provincial Government, of an alleged portion of the same lands for coal or petroleum mining purposes, the Attorney-General of the province is not a necessary party. [Quesnel Forks Mining Co. v. Ward, 42 D.L.R. 476, distinguished.] In such an action the burden of proving that the area in question is, as the defendant asserts, within exceptions set out in secs. 3 and 4 of the Settlement Act, ch. 14, 1884 (B.C.S.), lies on the defendant (per Macdonald, C.J.A.). On this point Martin, J.A., Galliher, J.A., concurring, referred to the

remarks of Duff, J., in Bank of Toronto v. Harrell (1917), 39 D.L.R. 262. McPhillips, J.A., was of the opinion if the onus was upon the plaintiff it had been fully discharged.

Esquimalt and Nanaimo R. Co. v. McLellan (B.C.), [1918] 3 W.W.R. 645. [See 41 D.L.R. 737, [1918] 3 W.W.R. 828.

PATENT FOR LAND—WATER LOT GRANTED BY CROWN — BOUNDARIES — SURVEYS — PLANS—DETERMINATION OF TRUE BOUNDARY-LINE—EVIDENCE — DECLARATION —COSTS.

Hamilton Motor Works v. Browne, 15 O.W.N. 90, reversing 13 O.W.N. 120.

II. Of the provinces.

(§ II—20)—TIMBER LEASE—SURRENDER—RENEWAL — LAND ACT — PRIORITIES—PRE-EMPTIONS.

The plaintiff's timber lease obtained in 1902, in accordance with sec. 7 of the Land Act Amendment Act, 1901, in renewal of a lease obtained in 1888, held to be subject to Crown grants made in 1893 and 1894 to pre-emptors [Brohm v. B.C. Mills Trading Co., 7 B.C.R. 123, not followed] (per Macdonald, C.J.A., Martin and Galliher, JJ.A., McPhillips, J.A., dissenting). The doctrine of omnia præsumuntur rite acta should apply in its fullest extent in respect to the compliance with statutory conditions in the obtaining of Crown grants for purchase or pre-emption under the Land Act, and, though it may be shewn in a proper case that irregularity, error or deception have in fact led to the issuance of such a grant, yet before it can be attacked the Crown must be at least a party to the proceedings, and the issue will, in many cases, depend upon the attitude taken by the Crown (per Martin, J.A.).

North Pacific Lumber Co. v. Sayward, [1918] 2 W.W.R. 771, 25 B.C.R. 322.

PRE-EMPTION — SALE—VALIDITY—"TRANSFER"—LAND ACT.

An agreement for sale of an undivided one-half interest in a pre-emption record, entered into prior to the issue of the Crown grant, comes within the definition of the word "transfer" in sec. 159 of the Land Act (R.S.B.C.) 1911, ch. 129, and is therefore absolutely null and void under the provisions of said section. [American-Abell Engine and Thresher Co. v. McMillan (1909), 42 Can. S.C.R. 377, followed.]

Burns v. Johnson, 25 B.C.R. 35, [1918] 1 W.W.R. 180.

PUBLIC POLICY.

As affecting contracts, see Contracts, III.

PUBLIC SCHOOLS.

See Schools.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Railways; Street Railways; Telegraphs; Telephones.

As to control by public utilities commission, see Railway Board.

PUBLIC WORKS.

See Crown; Municipal Corporations; Contracts; Railways; Expropriation.

QUALIFICATIONS.

Of voters, of candidates, see Elections.

QUANTUM MERUIT.

See Contracts; Damages; Master and Servant; Principal and Agent; Brokers.

QUASHING.

Of indictment, see Indictment, etc.

Of by-law, see Municipal Corporations.

Of convictions, see Summary Convictions; Certiorari; Criminal Law.

QUIETING TITLE.

See Cloud on Title; Land Titles; Vendor and Purchaser.

QUO WARRANTO.

(§ II C—30)—MUNICIPAL COUNCILLORS.

Quo warranto, in a single writ, may be issued against several municipal councillors illegally filling their offices, when the complaints against them are based on the same facts.

Olivier v. Rogers, 53 Que. S.C. 136.

(§ IV—41)—SERVICE OF WRIT—PLEADING—IRREGULARITIES.

The Quebec Code of Procedure does not order the particularized petition required for obtaining a prerogative writ, such as a quo warranto, to be served on the opposite party; a fortiori the latter cannot be allowed to answer the petition in writing nor urge irregularities. When in doubt, the judge should order a prerogative writ to be issued.

Maillet v. Dubeau, 19 Que. P.R. 50.

RAILWAY ACT.

See Railways.

RAILWAY BOARD.

See Carriers; Railways; Telegraphs; Telephones.

POWERS OF BOARD—ONTARIO RAILWAY ACT, SEC. 260a (8 GEO. V. CH. 30, SEC 4)—FAILURE TO EXCUSE NON-COMPLIANCE—NO APPLICATION TO RESCIND ORDER OR EXTEND TIME—ONTARIO RAILWAY AND MUNICIPAL BOARD ACT, R.S.O. 1914, CH. 186, SECS. 25, 42—VALIDITY OF ORDER OF BOARD — "SUPERIOR COURT" — BRITISH NORTH AMERICA ACT, SEC. 96 —MEMBERS OF BOARD NOT APPOINTED BY GOVERNOR-GENERAL — JURISDICTION — METHOD OF ATTACKING STATUS OF DE FACTO JUDGE — PROCEEDING BY QUO WARRANTO INFORMATION—ADMINISTRATIVE BODY — INCIDENTAL JUDICIAL POWERS — "SUPERIOR COURT" — "COURT."

Re Toronto R. Co. and City of Toronto, 15 O.W.N. 244.

RAILWAY COMMISSION.

See Railway Board.

RAILWAYS.

I. Franchises and rights; leases; railroad aid.
II. Construction and operation.
A. In general; change of gauge or route.
B. Crossings.
C. Fences.
D. Operation.
III. Accidents at crossings.
IV. Contributory negligence.
V. Diversion or obstruction of water.
VI. Insolvency and sale of railway.
VII. Acquisition by government.

See also Carriers; Railway Board; Street Railways; Crown.

As to expropriation matters, see Expropriation; Damages, III. L; Arbitration.

Liability for injuries to servants, see Master and Servant.

Annotations.

Animals at large through "wilful act or omission of owner": 32 D.L.R. 397; 33 D. L.R. 423, 35 D.L.R. 481.

I. Franchise and rights; leases; railroad aid.

(§ I—8) — Provincial railway — Amalgamation—Expropriation—Award.

The award of arbitrators appointed under the Manitoba Expropriation Act (R.S.M. 1913, ch. 61) to fix the compensation for lands crossed by a provincial railway company is not rendered void by the amalgamation of such company with a Dominion company, after the appointment of the arbitrators but before the award has been made, the arbitration proceedings having been continued after the amalgamation without objection on the part of either company. Sections 362 and 363 of the Dominion Railway Act continue and preserve the award against the amalgamated company. [Fargey v. Grand Junction R. Co., 4 O.R. 232, followed. Van Horne v. Winnipeg & Northern R. Co., 18 D.L.R. 517, referred to.]

Haney v. Canadian Northern R. Co. (Man.), 42 D.L.R. 41, [1918] 2 W.W.R. 834, affirming 36 D.L.R. 674.

II. Construction and operation.

A. In general; change of gauge or route.

(§ II A—10)—Blasting—Liability.

A railway company specially authorized by Dominion Act (2 Geo. V. ch. 74) to construct and operate a tunnel is liable in damages, under the Dominion Railway Act and the common law of Quebec, for injury to property caused by blasting in connection with such construction, although a necessary consequence thereof.

Bickerdike v. Canadian Northern Montreal Tunnel, etc., Co., 38 D.L.R. 425, 53 Que. S.C. 93.

Negligence — Railway yard — Switch stand too close to rail

Nelson v. Canadian Pacific R. Co., 39 D. L.R. 760, 55 Can. S.C.R. 626, [1918] 2 W. W.R. 177, reversing 35 D.L.R. 318, 10 S.L. R. 125. [Discussed in Herman v. Can. Pac. R. Co., 44 D.L.R. 343.]

Noise—Municipal by-law — Smoke from locomotives—Provincial Courts.

Unless it can be established that a railway company, in carrying on its undertaking authorized by Parliament upon its own property, in a manner which is calculated to do as little harm to adjacent owners as possible, is not exercising as much care as it might, to lessen the noise of operation, the Board has no jurisdiction to interfere. It is not incumbent upon the Board to summon offending parties before the Courts of the Province for violation of its own order and a municipal by-law regulating the emission of smoke from railway locomotives.

City of Toronto v. C.N.R. Co., 21 Can. Ry. Cas. 452.

"Damage"—Power of courts — Illegal operation of railway.

The "damage" referred to in sec. 32, ch. 36, 1912 (B.C.S.), incorporating the defendant railway, includes a claim for compensation because of obstruction of a riparian owner's right of access to the sea. Quære, whether, after a railway has been constructed and is in operation, a court of law can decide that it has been constructed and is being operated illegally.

Nelson v. Pacific Great Eastern R. Co., [1918] 1 W.W.R. 597, 25 B.C.R. 259. [See [1918] 3 W.W.R. 85.]

Taking gravel—Trespass.

Where a railway company, in entering upon land and removing soil therefrom for the purposes of the railway, does not ignore the owner or make the entry defiantly or contemptuously of him, but is reasonably justified, because of their negotiations with him or his agent, in assuming that it is acting with his consent, or, at any rate, that there will be little or no difficulty in reaching a satisfactory adjustment of the price to be paid for the soil removed, it cannot be said that the company is a trespasser. [Hanley v. T.H.B. R. Co., 11 O.L.R. 91; Wicher v. C.P.R. 16 Man. L.R. 343, distinguished]. Per Morrison, J., affirmed by Macdonald, C.J.A.; and Martin, J.A., McPhillips, J.A., dissenting. Eberts, J.A., also was in favor of allowing the appeal, but gave no reasons.

Isitt v. Grand Trunk Pacific R. Co. (B.C.), [1918] 3 W.W.R. 500.

B. Crossings.

(§ II B — 15) — Expropriation — Farm crossing — Contract — Servitude — Value.

An owner entitled, under indenture with

... a proper case and on proper terms. ... Grand Trunk Ry. Co. v. Therrien, 30 ... S. R. 485; Midland Ry. Co. v. Gribble ... 2 Ch. 129, 527.]

... Bros. v. C.P. R. Co., 21 Can. Ry. ...

... — REMOVAL OF PLANKS BY RAILWAY COMPANY—DUTY TO RESTORE—... OF BOARD OF RAILWAY COMMISSIONERS—RAILWAY ACT, R.S.C. 1906 ... SECS. 252, 253—DAMAGES.

... v. Grand Trunk R. Co., 14 O.W.N. ...

... BRIDGE—BRANCH LINE—JURISDICTION OF BOARD.

Where a company is authorized by its charter to build a bridge and lay railway tracks upon it, but has no power to build a railway, the Board has no jurisdiction to authorize it to build a branch line of railway under sec. 175, 3 Edw. VII. ch. 58 (Railway Act, 1903).

International Bridge and Terminal Co. v. ... R. Co. and Russel Bros., 21 Can. Ry. ... 218.

... — MUNICIPALITY — JURISDICTION.

In dismissing an application by a railway company to construct a spur on a highway, the Board has no jurisdiction to impose terms on the municipality concerned as to the use it should make of the highway ... The Board's jurisdiction is confined to authorizing the construction and maintenance of the railway on the highway.

... of Montreal v. C.P. R. Co., 21 Can. Ry. Cas. 214.

... — DEDICATION—SENIOR AND JUNIOR ...

When it is sought to open a highway across a railway, there must be evidence of intention to dedicate by the owner, acceptance by the municipality, user by the public, and expenditure of public money to keep the proposed highway in repair and fit for use to bring it within the category of a public highway under the Municipal Act, R.S.O. 1914, ch. 192, sec. 432. Without such evidence the proposed highway is junior to the railway and under the senior and junior rule the whole of the expenditure required will be placed on the applicant. [Goodeham v. City of Toronto, 25 Can. S.C.R. 246, distinguished.]

... of Hamilton v. Hamilton Radial Electric R. Co., 22 Can. Ry. Cas. 438.

... — DEDICATION — ACCEPTANCE — DEVISE—RIGHT OF WAY.

A will devising a right-of-way to a certain class of individuals does not make a right-of-way, where it crosses a railway, a highway crossing: there being no evidence of the acceptance of a highway at that point by the municipality nor recognition of its existence by the railway company:

the railway is senior to the highway at the point of crossing. [Village of Weston v. Grand Trunk and Canadian Pacific Ry. Cos. (Denison Avenue Crossing Case), 7 Can. Ry. Cas. 79; Town of St. Pierre v. Grand Trunk Ry. Co. (Simplex Avenue Crossing Case), 13 Can. Ry. Cas. 1; City of Montreal v. Canadian Pacific Ry. Co., 18 Can. Ry. Cas. 50, followed.]

Grand Trunk R. Co. v. City of Hamilton, 22 Can. Ry. Cas. 442.

APPORTIONMENT OF COST — SENIOR AND JUNIOR RULE.

In apportioning the cost of protection at railway crossings of highways which have been in existence for many years, the volume of traffic on the highway and railway respectively, which has made the crossing dangerous, is an element to which more weight should be given than the question of seniority merely.

City of Montreal v. G.T. R. Co., 22 Can. Ry Cas. 444.

HIGHWAY—RAILWAY GRADE CROSSING FUND.

Where a highway crossing over a railway has not been legally established prior to April 1, 1909, it may be considered a highway crossing of the railway at grade level within the meaning of the Railway Grade Crossing Fund, sec. 239 (A), 8 & 9 Edw. VII. ch. 32, sec. 7, and the Board may legalize the crossing and make a contribution of 20 per cent. out of that fund towards the installation of gates, the remainder of the costs of protection to be borne by the applicants.

City of Maisonneuve v. C.N. R. Co., 22 Can. Ry. Cas. 446.

D. OPERATION.

(§ II D—30)—NEGLIGENCE—FIXED SIGNAL —SWITCHSTAND.

A switch stand is not a fixed signal within the meaning of the railway rules and regulations, and is governed by different rules; an engineer is not guilty of negligence in passing a red light on a switch stand, although compelled by the railway rules to stop where such light is shewn as a fixed signal. Per Anglin, J.:—The words "must know" in rule 401 do not import knowledge acquired by use of the engineer's own eyes to the exclusion of every other source of knowledge, however reliable.

Canadian Pacific R. Co. v. Walker, 43 D. L.R. 698, [1918] 3 W.W.R. 781, affirming 40 D.L.R. 547, 11 S.L.R. 192, [1918] 2 W.W.R. 336.

(§ II D—70)—ANIMALS—FARM CROSSING— SWING GATES.

Section 295 of the Railway Act provides that "no person whose horses . . . are killed or injured by any train shall have any right of action against any company in respect of such horses . . . being killed or injured, if the same were so killed or injured by reason of any person (a) for whose use any farm crossing is furnished failing to keep the gates at each side of the railway closed when not in use." This section is no defence to an action for damages if the gates when erected would not swing, and the hinges and fastenings have not been maintained as required by sec. 254 and have become useless. [See annotations 32 D.L.R. 397; 33 D.L.R. 423.]

Prouse v. Canadian Northern R. Co. (Man.), 42 D.L.R. 159, [1918] 2 W.W.R. 845.

ANIMALS AT LARGE—NEGLIGENCE — WILFUL ACT.

Section 294 of the Railway Act, R.S.C. 1906, ch. 37, sec. 294, as amended by 9-10 Edw. VII. ch. 50, sec. 8, means that if animals are allowed by their owner to be at large within one-half mile of the intersection of the railway and a highway at level, the owner takes the risk upon himself of any damages which may be caused to or by them upon the intersection, and if such damages are caused to the animals, not upon the intersection but upon the railway property beyond it, the company would be liable, unless it established that the animals got at large through the negligence or wilful act or omisson of the owner or his agent.

Anderson v. Canadian Northern R. Co., 43 D.L.R. 255, 57 Can. S.C.R. 134, [1918] 3 W.W.R. 107, affirming 35 D.L.R. 473, 10 S.L.R. 325, 33 D.L.R. 418.

Where the by-laws of a municipality permit the running at large of animals, it is neither negligence nor a wilful act or omission within the meaning of sec. 294 (4) of the Railway Act for the owner to allow them to run at large, but if such animals are allowed to be at large within one-half mile of the intersection of the railway and a highway at rail level, the owner takes the risk of any damages that may be caused to them upon the intersection, and if damage is caused to such animals, not upon the intersection, but upon the railway property beyond it, the railway company will be liable, unless it is established that the animals got at large through the negligence or wilful act or omission of the owner or his agent. [Anderson v. Canadian Northern R. Co., 35 D.L.R. 473, followed; see annotations 32 D.L.R. 397; 35 D.L.R. 481.]

Fraser v. Canadian Northern R. Co. (Man.), 43 D.L.R. 562, [1918] 3 W.W.R. 962.

ANIMALS AT LARGE—POISONOUS SUBSTANCE LEFT BY SHIPPER.

The protection given a railway company under sec. 294 of the Railway Act, R.S.C. ch. 37, as amended by sec. 8, ch. 50 (1910), against liability for damage to cattle running at large through the wilful act or omission of their owner does not extend to an invitee of the company, e.g., a ship-

per who unloads his own freight. Where such shipper negligently leaves on the right of way a poisonous substance mixed with food naturally attractive to cattle, and cattle so running at large die as the result of eating the mixture, the shipper is liable for their loss, even though the cattle should be considered as trespassing.

Dawson v. Canadian Pacific Railway Co. (B.C.), [1918] 2 W.W.R. 923.

III. Accidents at crossing.

(§III A—47)—INJURY TO PERSON CROSSING TRACK—"SPLIT-SWITCH"—NEGLIGENCE —AUTHORIZATION OF SWITCH—BOARD—JURISDICTION—HIGHWAY.

At about 10 o'clock at night on a day in April, 1915, D. was found lying beside the tracks of the defendants at a place where the tracks were crossed by Q. street, in the town of P., "with practically both thighs amputated above the knee and one foot tightly caught in the frog or switch." D. died shortly afterwards, and this action was brought by the administrator of his estate to recover damages for his death. The switch was of the kind known as a "split-switch." At the trial, the jury, in answer to questions, found that the death was caused by the defendants' negligence, which, they said, consisted in having a split-switch on the public highway; and they found against contributory negligence:—Held, upon the evidence, that the Dominion Board of Railway Commissioners had not approved of the placing of the split-switch at the crossing; and the defendants were not relieved or otherwise assisted by the provisions of sec. 238 of the Railway Act, enacted by 8 & 9 Edw. VII. ch. 32, sec. 5, merely because no complaint or application had been made to the Board under that section—it was not to be presumed that, because the Board had not been put in motion, approval of the switch had been given. Held, also, upon the evidence, that Q. street was a public highway. Held, also, that the inference could properly be drawn by the jury that the construction and maintenance of the switch on the highway was a source of danger to those having the right to pass over the street; that there was, therefore, evidence of negligence to go to the jury; and that the jury, in basing their conclusion on a consideration of that evidence, were not usurping the jurisdiction of the Board. Not only must an authorized act be done in a reasonable way and without negligence, but there is the additional obligation upon one exercising a statutory or authorized power, not to exceed that power. Whatever were the rights which the defendants acquired in respect to the highway, they did not include the erection and maintenance thereon of the split-switch. [Southwark and Vauxhall Water Co. v. Wandsworth District Board of Works, [1898] 2 Ch. 603, 611; Roberts v. Charing Cross, Euston and Hampstead R. Co. (1903), 87 L.T.R. 732, 734; Moore v. Lambeth Waterworks Co. (1886), 17 Q.B.D. 462, 465, referred to.] Held, also, that, although no one saw the accident happen, it could have happened only from an engine or train passing over D.'s body; and it was open to the jury to draw the conclusion they did. Held, also, that the evidence sustained the jury's findings against contributory negligence.

Brunelle v. G.T. R. Co., 43 O.L.R. 220, 44 D.L.R. 48.

INJURY TO PERSON ATTEMPTING TO CROSS TRACKS—ACCIDENT—ABSENCE OF ACTIONABLE NEGLIGENCE—NONSUIT.

Folick v. Wabash R. Co., 15 O.W.N. 155.

(§ III—50)—HAND CAR—SIGNAL — HORSES —CONTRIBUTORY NEGLIGENCE.

Although small hand-cars used for working on railways are not provided with any alarm signal, and although the Railway Act and the rules of the Railway Commission do not call for any, yet, as these hand-cars are not bound to stop at crossings, their drivers must signal their approach, either to avoid a collision or to enable the driver of a horse approaching the railway to watch his horse and to master it in time. Although the omission of giving such signal is an act of negligence rendering the railway company liable in the event of an accident, it is not so when a passer-by, the victim of the accident, saw the hand-car coming and nevertheless took upon himself to cross the railway.

Lemieux v. Langevin, 54 Que. S.C. 542.

IV. Contributory negligence.

See Negligence; Street Railways; Carriers.

V. Diversion or obstruction of water.

See Waters.

(§ V — 115)—EMBANKMENT — BRIDGE — INJURY TO PROPERTY BELOW BY FLOODING—EVIDENCE—TRIAL—JURY —STATEMENTS OF COUNSEL — PREJUDICE — DAMAGES.

Sullivan v. Canadian Northern R. Co., 14 O.W.N. 93.

OBSTRUCTION OF DRAINS AND DITCHES—INUNDATION—RAILWAY COMMISSION.

Although sec. 250 of the Railway Act gives exclusive jurisdiction to the Railway Commission to compel a company to make drainage works deemed necessary, one who suffers damages on account of the negligence of a railway company to carry out drainage works which the law required is not compelled to apply to the Railway Commission to have the works declared insufficient, before claiming damages in the civil courts. The compensation for expropriation granted to an owner of land under cultivation for all damages which he might suffer on account of the construction and laying out of a railway only covers damages

which result from the construction of the railway, under the conditions provided for by the Act, and not those which result from the culpable negligence of the company to maintain ditches and drains sufficient to drain the lands divided by the construction of the way.

Canadian Northern Quebec R. Co. v. Desmarais, 27 Que. K.B. 509.

VI. Insolvency and sale of railway.

(§ VI—130)—BONDHOLDERS.— SALE OF SEVERAL RAILWAYS BY RECEIVER—DISTRIBUTION OF PROCEEDS OF SALE — PRIORITIES—EXCHANGE OF BONDS OF FIRST ISSUE FOR THOSE OF SECOND ISSUE — MISREPRESENTATION — REINSTATEMENT OR RESCISSION—REFERENCE —ACQUISITION OF COUPONS—PURCHASE OR PAYMENT AND SATISFACTION.

Trusts and Guarantee Co. v. Grand Valley R. Co., 15 O.W.N. 23, varied in 15 O. W.N. 247. [See 15 O.W.N. 426.]

VII.. Acquisition by government.

(§ VII—140)—"SUBSIDIES" — "ACTUAL COST"—INTEREST AND CHARGES ON BONDS.

The court was required to fix the value of certain railways to be acquired by the Crown under the provisions of 6 & 7 Geo. V. ch. 22. By sec. 2 of such statute it was provided that the consideration to be paid for each of the said railways should be the value as determined by the Exchequer Court of Canada, "said value to be the actual cost of the said railways, less subsidies and less depreciation, but not to exceed $4,349,000, exclusive of outstanding bonded indebtedness, which is to be assumed by the government, but not to exceed in all $2,-500,000." Held, that the word "subsidies" in the above section did not relate only to those granted by the Dominion Government but extended to any subsidies granted by the provincial government to the railways in question. The court in finding the "actual cost" ought not to proceed as if the matter were an accounting between the directors of the railways and the shareholders. The duty of the court was to ascertain the value of the railways as between vendor and purchaser, and that value must be taken to be the actual cost of the railways less subsidies and less depreciation. Interest on bonds issued by the company and moneys paid on the flotation of bonds during the period of construction of the railways could not be included in "actual cost" as the term was used in the statute.

Att'y-Gen'l of Canada v. Quebec & Saguenay R. Co., 41 D.L.R. 576, 17 Can. Ex. 306.

RATES.

See Carriers; Telegraphs; Telephones.

RATIFICATION.

By infant, see Infants.
Of agent's acts, see Principal and Agent.

REAL ESTATE AGENTS.

See Brokers, II.; Principal and Agent.

REAL PROPERTY.

See Public Lands; Mines and Minerals; Land Titles; Vendor and Purchaser; Fixtures; Easements; Adverse Possession.
Nature of estate, see Deeds; Wills; Mortgage.
Indian lands, see Indians.

RECEIVERS.

Liquidators, assignees, see Assignment for Creditors: Companies, VI.

Annotations.

Appointment of receivers and trustees in charge of enemy companies and firms during war: 23 D.L.R. 375, 379.
When appointed: 18 D.L.R. 5.

ACTIONS AGAINST — NEGLIGENCE — LEAVE OF COURT.

A receiver, being an officer of the court, cannot be sued without leave in a separate action in respect of acts done in discharge of his office.

Stephens v. Royal Trust Co., 25 B.C.R. 77.

RECOGNIZANCE.

See Bail and Recognizance.

RECORDER'S COURT.

JURISDICTION—ENFORCEMENT OF BY-LAWS.

The Recorder's Court of the City of Montreal is given jurisdiction by the charter of this city in any action for the enforcement of any by-law in force in the City of Montreal.

Henry Morgan Co. v. City of Montreal, 24 Rev. Leg. 486.

JURISDICTION — MUNICIPAL BY-LAW—NUISANCE—CONTRACT—PROHIBITION.

The Recorder's Court of the City of Montreal has jurisdiction to hear and try any complaint or action for infraction of the by-laws of the City of Montreal, respecting public nuisances. A writ of prohibition lies only when a court of inferior jurisdiction exceeds its jurisdiction, and not to inquire whether it tried it rightly or wrongly.

Montreal Abattoirs v. La Cour du Recorder, 27 Que. K.B. 162.

JURISDICTION — VIOLATION OF BY-LAWS— NUISANCE—CONSTITUTIONALITY — PROHIBITION—CERTIORARI.

The Recorder's Court of Montreal has jurisdiction to hear and try offences against the city by-laws, especially breaches of a by-law by a tannery owner who allows his establishment to become a nuisance. If a by-law of the City of Montreal is attacked as

ultra vires, whether of the powers of the city or of the Legislature of Quebec, the question can be raised before the Recorder's Court, and his decision revised by certiorari. Art. 10 of by-law 39 of the City of Montreal, entitled "By-law against nuisances," adopted March 15, 1878, is constitutional and legal.

Galibert v. La Cour du Recorder, 53 Que. S.C. 82.

RECORDS AND REGISTRY.

See Registry Laws.

REDEMPTION.

See Mortgage; Vendor and Purchaser; Taxes.

RE-ENTRY.

See Landlord and Tenant.

REFERENCE.

(§ I—1)—TORT — ACCOUNT—JUDICATURE ACT.

Where the tort has been waived by the plaintiff in an action for water wrongfully and fraudulently taken, the wrongdoer being called upon to pay the value of the water taken, the whole question in dispute consisting of matters of account, an order referring the whole action to the official referee for trial is properly made under sec. 65 (c) of the Judicature Act, R.S.O. 1914, ch. 56.

Oshawa Board of Water Commissioners v. Robson Leather Co., 43 D.L.R. 89, 42 O.L.R. 635.

(§ I—9)—CHARACTER OF LAND—TITLE.

A bare question of fact regarding the character of land is not a question of title, such a question if pleaded as a defence might be specially referred to the Master for enquiry, but would not be included on a general reference as to title.

Canadian Pacific R. Co. v. Blunt, 42 D.L.R. 624, 13 A.L.R. 554, [1918] 3 W.W.R. 219.

REGISTRY LAWS.

See Land Titles; Mechanics' Liens; Bills of Sale; Chattel Mortgage.

Conditional sale, see Sale.

Annotations.

Land Titles Act; Registry Act; caveats; notice: 33 D.L.R. 9.

Registrability of hiring, lease, or conditional sale of chattels: 32 D.L.R. 566.

(§ III A—10)—REGISTRATION OF CROWN GRANT—LEASE OR CHARGE.

Re Canadian Explosives and Land Registry Act (B.C.), 39 D.L.R. 764, [1918] 1 W.W.R. 399.

SUPPLEMENTARY DEED—HYPOTHEC — THIRD PARTIES—INSOLVENCY.

(Per Sir Horace Archambault, C.J., and Lavergne and Cross, JJ.) Third parties cannot be bound by a stipulation in a supplementary deed fixing another period for the payment of a debt than the period mentioned in an hypothecary obligation, unless that second deed is registered. (Per Cross, J.) A creditor may take a personal action against his debtor and an hypothecary action against the third party in possession of the property, although the supplementary deed has not been registered, if the debtor has become insolvent, and such right is under art. 1092, C.C. (Que.). (Per Carroll and Pelletier, JJ.) It is not necessary to have the above mentioned supplementary deed registered.

Larcher v. Kydd, 27 Que. K.B. 321.

RELIGIOUS INSTITUTIONS.

Annotation.

Libel and slander in church matters: 21 D.L.R. 71.

REMAINDERS.

See Wills, III.

REMEDIES.

See Action; Pleading.

For enforcing liability of stockholder, see Companies.

In cause of fraud, see Fraud and Deceit; Fraudulent Conveyances.

Of insured, see Insurance.

For nuisance, see Nuisances.

Of parties to sale, see Sale; Vendor and Purchaser; Specific Performance.

For workmen's compensation for injuries, see Master and Servant, V.

For death, see Death.

REMOVAL OF CAUSES.

See Courts; Venue; Appeal.

RENEWAL.

Of promissory note, see Bills and Notes.

Of mortgage, see Mortgage; Chattel Mortgage.

RENT.

See Landlord and Tenant; Mortgage.

LIFE RENT—GUARANTEE BY HYPOTHEC—JUDICIAL SALE — LOSS — RIGHT OF RENTEE.

The debtor of a life rent, who, after having secured its payment by hypothec, allows one of the hypothecated properties to be judicially sold, diminishes, by his own act, the securities he had given by the contract, and accordingly he loses the benefit of the delay. Under such circumstances, the person entitled to the rent is not bound to protect himself by means of an opposition to secure charges; but he may claim from the debtor the capital of the rent.

Massicotte v. Bourassa, 54 Que. S.C. 37.

REPAIRS.

See Highways; Railways; Bridges; Landlord and Tenant.

REPLEVIN.

(§ II C—30)—Security under rules — Damages.

A plaintiff who replevies goods and gives the security required under rules 469 and 472 (Alta.). undertakes an obligation to pay such damages as the defendant may suffer if the plaintiff fails to establish his claim.

Shewczuk v. Breeko, 39 D.L.R. 588, 13 A.L.R. 234, [1918] 1 W.W.R. 639.

Rule 359—Security — Rule 362 — Jurisdiction of Master in Chambers.

Stock v. Meyers, 14 O.W.N. 361.

Injunction — Receiver — Time — Possession.

In an action brought to recover certain goods alleged to have been sold to the plaintiff and for damages, a replevin order and an injunction against the selling of the goods, an order was made which restrained the defendant from disposing of the goods, authorized the plaintiff to pay into Court a certain sum of money in lieu of the bond required upon issue of a replevin order, and, this being done, directed the sheriff to take the goods and hold them until the issues in the action were determined. Held, that the order was in effect a receiver order and was justified, although the action was begun and the order made before the time when the plaintiff was to be entitled to possession had arrived.

Kay v. Ratz, [1918] 3 W.W.R. 885, 44 D.L.R. 145, 14 A.L.R. 72.

REPLY.

See Pleading.

REPUDIATION.

See Contracts; Sale; Vendor and Purchaser; Infants.

Of subscription for shares, see Companies.

REQUETE CIVILE (Quebec).

See Judgment, VII.

RESCISSION.

See Contracts, V.; Sale, III.; Vendor and Purchaser.

RES JUDICATA.

See Judgment, II.

RESTRAINT OF TRADE.

See Contracts, III.; Monopoly.

REVENDICATION (Que.).

Action—Jurisdiction — Pasturage agreement—Right of retention.

In a revendication action the jurisdiction of the superior court is determined by the amount at which the article sold is valued in the declaration. And when the plaintiff restricts himself to revendicating the article on which he claims a right of retention, and of which he claims to have been illegally dispossessed without asking that the defendant pay the debt due to him, the court cannot give judgment outside of the conclusions, and the only question to solve is that of deciding whether the plaintiff possesses the right of retention which he claims. An agreement for pasturage of a horse is, from its nature, a lease which includes an obligation by the lessor to procure for the lessee the enjoyment of the pasturage required for feeding of the horse, and by the lessee an obligation to pay the rent or price of such enjoyment; such agreement gives the lessee authority to drive his horse into the pasturage, to leave it there to graze, and to go and seek it as he likes, but does not take away from him any right of possession of his horse, and does not give any to the lessor. A right of retention can only result from the law, or an express stipulation in the contract; it cannot be presumed, or based upon simple reasons of equity.

Paquette v. Beauvais, 24 Rev. de Jur. 428.

REVIEW.

See Appeal.

Of assessments, see Taxes, III.

Of award, see Arbitration.

RIGHT OF WAY.

See Easements; Railways; Expropriation.

RIVERS.

See Waters; Fisheries.

RULES OF COURT.

(§ I—1)—Amendment of — Powers of judges—Redrafting.

Under rule 713 of the Alberta rules the judges of the Supreme Court are "authorized to alter and amend any Rules of Court or tariff of costs or fees for the time being in force or make additional rules or tariffs." This rule includes the redrafting of a rule in entirely different language if what is done is in reality merely an alteration.

McIntyre v. Alberta Pacific Grain Co. (Alta.), 43 D.L.R. 682, [1918] 3 W.W.R. 906.

SALE.

I. What constitutes; validity; effect.
- A. In general.
- B. Passing of title; delivery.
- C. Conditional sales.
- D. Acceptance; retention.

II. Warranty.
- A. In general.
- B. By description.
- C. Of quality; genuineness or fitness.
- D. Effect of inspection; or opportunity to inspect.

III. Rights and remedies of parties.
- A. In general.
- B. Lien for price; stoppage in transitu.
- C. Rescission.
- D. Rights of bonâ fide purchasers.

IV. Bulk sales.

Registration of bills of sale, see Bills of Sale; Chattel Mortgage.
Construction of contract, see Contracts, II.
Of corporate stock, see Companies.
Measure of damages, see Damages, III.
Judicial sale, see Judicial Sale; Executions; Mortgage.
For taxes, see Taxes, III.
Of land, see Vendor and Purchaser.

Annotations.

Rescission of contract for fraud and damages for deceit: 32 D.L.R. 216.
Acceptance and retention of goods sold: 43 D.L.R. 165.

I. What constitutes; validity; effect.

A. In general.

(§ I A—1)—Of things subject to lien.

A sale of things subject to a lien may be ordered provided the purchaser, before taking possession, fully disinterests the lien holder.
Gingras v. Maher, 19 Que. P.R. 230.

B. Passing of title; delivery.

(§ I B—5)—Goods not specified or ascertained.

A contract for the sale of 1,200 bushels of wheat, which may be complied with by the delivery of any 1,200 bushels of wheat, is not a sale of any specific or ascertained wheat; sec. 18 of the Sale of Goods Act (Sask.) applies, and no property in the goods is transferred to the buyer, unless and until the goods are ascertained.
Zaiser v. Jesske. 43 D.L.R. 223, 11 S.L.R. 462, [1918] 3 W.W.R. 757.

Purchase price—Right to refund.

A purchaser of goods who has paid the purchase price agreed upon, and for which he has received full consideration, has no further interest in such purchase price. The refusal of the vendor to accept a portion of the purchase price which he has agreed might be charged by the agent making the sale, does not entitle the purchaser to a refund of this amount, as having been paid for a particular purpose which has failed.
Devall v. Gorman, 42 D.L.R. 573, 13 A.L.R. 557, [1918] 3 W.W.R. 221. [Reversed by Supreme Court of Canada.]

Sale of another's property—Stolen goods—Attachment.

The depository of merchandise who is surreptitiously dispossessed by a person taking the name of the depositor, and who sells these stolen goods to a third person, has a right to an attachment against him. The rules of exception to the nullity of the sale of the thing stolen, contained in arts. 1488 to 1490 of C.C. (Que.), ought to be interpreted strictly and with limitation. It is sound legal doctrine that any contract or bargain may take on the character of commerciality as to one of the contracting parties and non-commerciality as to the other party; and in this case the contract is not commercial in the meaning of arts. 1488, 1489, 1490 C.C. (Que.) relating to the sale of the thing stolen. Art. 1489 C.C. (Que.) applies only to one who exercises his trade publicly, ostensibly and habitually in the locality where he is known, and the fact of occasionally selling effects at the place of business of the purchasers cannot constitute this occasional vendor "a trader dealing in similar articles." The meaning of the word "stolen" in art. 1489 C.C. (Que.) should not be interpreted restrictively so as to be absolutely within the limits of the definitions of the authors of criminal law, but it should be largely extended; and it is sufficient that the lawful possessor be dispossessed of the thing fraudulently, by one who wrongfully appropriated it, in order that the latter's act may constitute a theft.
Charron v. Walker, 54 Que. S.C. 439.

(§ I B—6)—By sample.

The property in goods passes when the seller and buyer intend it shall pass—an order for goods after inspecting samples is not necessarily a "sale by sample." The property in goods so ordered, and sent by carrier, addressed to the buyer, passes upon the delivery to the carrier.
Re Faulkners, 38 D.L.R. 84, 40 O.L.R. 75, 12 O.W.N. 258, affirming 12 O.W.N. 50.

(§ I B—11)—Machinery—Title.

Under a contract of purchase, which entitles the purchaser to have machinery erected in good running order on his premises, under the superintendence of the vendor's expert, before he can be called upon to accept and pay for it, the property in the goods does not pass until this condition is complied with and if the machinery shipped in parts is lost in transit the loss falls on the vendor.
R. Hoe Co. v. Dame Foote, 40 D.L.R. 678, 53 Que. S.C. 430.

Animal — Title — Promissory note — Transferee without notice.

The defendants having purchased a colt at an auction sale, gave therefor the following document, dated March 21, 1917:—"November 1st, 1917, after date, for value received we promise to pay David Ebel or order, the sum of one hundred fifty-one xx/100 dollars, at the Standard Bank of Canada, Prussia, Sask., with interest at 10 per cent. per annum until due, and 12 per cent. per annum after due until paid. Given for one roan colt, 2 years old, white star on forehead. The title, ownership and right to possession of the property for which this note is given shall remain in until this note or any renewal or renewals thereof, together with all interest, is fully paid; and if we make default in payment of this note or any renewal or renewals thereof or any other note in his favour, or should we sell or dispose of, or mortgage our landed property, or if he should consider this note insecure (of which he shall be sole Judge) he has full power to declare this note and any renewal or renewals thereof, and all other notes made by us in his favour, due and payable forthwith and may immediately take possession of the said

property and hold it until such notes are paid, or sell the said property at public or private sale, the proceeds thereof to be applied in reducing the amount with interest unpaid thereon, and the holder hereof, notwithstanding such taking possession or sale, shall have thereafter the right to proceed against us and recover, and we hereby agree to pay the balance and interest then found to be due thereon, and we hereby as to this date waive all and any right to exemption from seizure and sale under execution of any lands or goods." The Court held, on the evidence and the circumstances of the case, that the agreement between the parties was that the property in the colt should remain in the vendor until the note was paid, and being in the vendor when the colt died, the agreement to buy as between the parties was avoided by sec. 9 of the Sale of Goods Act. But the document being a promissory note and the transfer being sufficiently endorsed to the plaintiff under sec. 63 of the Bills of Exchange Act, and having been taken by the plaintiff in good faith for value before maturity, and without notice of existing equities, the plaintiff holds the note freed from such equities, and can recover against the defendant. [Robert Bell Engine & Thresher Co. v. Topolo, 32 D.L.R. 77, 9 S.L.R. 384; Richards v. Frankum, 9 C. & P. 220, considered.]

Edgar v. Bahrs and Chapman, 43 D.L.R. 372, 11 S.L.R. 457, [1918] 3 W.W.R. 817.

C. Conditional sales.

(§ I C—15)—Recovery of purchase price —Threats.

Threatening the purchasers in a conditional sale of a chattel, with serious consequences if they use it, goes to the root of the contract and justifies the purchasers in regarding it as ended; the sellers cannot recover the purchase price.

Robert Bell Engine & Thresher Co. v. Farquharson, 39 D.L.R. 625, 11 S.L.R. 81, [1918] 1 W.W.R. 924.

Automobile—Conditional sale—Insurance—Destruction by fire—Rights of parties.

Coulombe v. Rouillard, 40 D.L.R. 749, 24 Rev. de Jur. 249.

Lien-note—Default in payment of instalments—Seizure of goods—Sale within 20 days—Non-compliance with Conditional Sales Act, sec. 8—Claim for deficiency—Conversion—Nominal damages—Wages—Evidence —Fraud—Costs.

Shannahan v. Brown, 13 O.W.N. 447.

(§ I C—17)—Lien note—Affidavit of bonâ fides—Registration.

A clause in an affidavit of bonâ fides required to be filed with a lien note, "that the copy of the within agreement truly sets forth the agreement between the parties mentioned therein, and that the agreement therein set forth in bonâ fides and not to protect the goods in question against the creditors of the said buyer or bailee," does not comply with sec. 2 (3) of the Act respecting Lien Notes and Conditional Sales of Goods (R.S.S. 1909, ch. 145), and the lien note cannot properly be registered, and therefore under sec. 1 of the Act cannot be set up against judgments or executions against a purchaser or bailee.

Theatre Amusement Co. v. Squires, 43 D.L.R. 496, 11 S.L.R. 411, [1918] 3 W.W.R. 831.

Registration—Description of goods—Promissory note.

In order to comply with sub-sec. (2) of sec. 2 of the Sale of Goods Amendment Act, 1916, which requires that chattels included in a conditional sale agreement be so described "that they may be clearly identified." Held (affirming the decision of Lampman, Co.J.), that there must be such material on the face of the instrument as would indicate how the property may be identified if proper inquiries are instituted. Where a promissory note is taken as security contemporaneously with a hire receipt and the promissory note is not mentioned in the hire receipt, the hire receipt is not void by reason of non-registration of the note.

Brandon v. Plimley, 24 B.C.R. 441, [1918] 1 W.W.R. 831.

(§ I C—19)—Repossession.

The repossession by a seller in accordance with a provision therefor in an agreement for the sale of goods on deferred payments is not a rescission of the agreement and a bar to recovery of the purchase-price. [Sawyer v. Pringle, 18 A.R. (Ont.) 218 at p. 222; Peebles v. Johnson, 1 S.L.R. 523; Canadian Port Huron Co. v. Fairchild, 3 S.L.R. 228, followed.]

Nichols & Shepard Co. v. Chamberlain (Sask.), [1918] 3 W.W.R. 308.

Repossession—Notice by registered mail —Purchase by vendor—Costs—Action for deficiency.

The plaintiff, under the terms of a lien note executed by the defendant in his favour, repossessed a mare, the subject-matter of the note. The notice of intended sale required by R.S.S. (1909), ch. 145, sec. 8, was given by registered mail, and at the ensuing auction the plaintiff himself bid thereon and, being the highest bidder, became the purchaser. On the same day he resold the mare for the sum at which he had purchased, and after crediting the amount of the resale, less certain sums charged as expenses, the plaintiff brought action for the balance owing on the note. Held, that notwithstanding the fact that the defendant (buyer) was not absent, the statute did not require the notice of intended sale to be served personally, but that its service by registered mail was sufficient. [Vanstone v. Scott, 1 A.L.R. 462, 9 W.L.R. 257 followed]; that the plaintiff could not become the purchaser at the auction, that his position was the same as if there had been an

abortive sale, and that his right under the note to sell by private sale was not affected; that [following McHugh v. Union Bank, [1913] A.C. 299, 10 D.L.R. 562] the plaintiff was entitled to retain reasonable and proper costs in respect of services not provided for by R.S.S. (1909), ch. 51, but that the plaintiff was not entitled to any reimbursement for his own services but merely for his actual and necessary expenses.

Toth v. Hilkevics, 11 S.L.R. 95, [1918] 1 W.W.R. 905.

REPOSSESSION — MACHINERY — MECHANICS' LIEN—AFTER-ACQUIRED PROPERTY—EQUITABLE MORTGAGE—"MORTGAGEE"—SALE OF GOODS ACT.

An agreement between the vendor and purchaser of mineral claims that if mechanics' liens should be filed against the property the vendor should have the right to enter and "possess himself of all machinery, fittings . . . upon the mineral claims and to sell the same" and so recoup himself for any moneys paid by reason thereof, held to cover after-acquired property, and to constitute an equitable mortgage. The vendor under such an agreement is a "mortgagee" within the meaning of sec. 28, Sale of Goods Act, R.S.B.C., ch. 203.

Sullivan Machinery Co. v. Bank of Montreal (B.C.), [1918] 3 W.W.R. 17.

D. ACCEPTANCE; RETENTION.

(§ I D—20)—ACCEPTANCE—ACTION FOR PRICE—DEFENCE.

A purchaser who makes no complaint to the vendor as to the quality of goods sold, until months after the goods have been accepted and paid for, although he has complained to an agent of the vendor, who has no authority except to receive orders, cannot set up such claim in an action for the purchase price of the goods.

Maritime Coal, Railway & Power Co. v. Clark (N.B.), 43 D.L.R. 158 (annotated).

REPRESENTATIONS BY AGENT—RIGHT TO REJECT—AGENT'S AUTHORITY.

A purchaser having made known to the vendors the purpose for which he required a gas traction engine, so as to shew them that he was relying on their skill and ability to furnish him with one reasonably fit for his purpose, signed an order for "one of your Big Four 30 h.-p. gas traction engines." The agreement provided that the order was "made upon the express condition that" it "contains all the terms and conditions of the sale . . . and cannot in any manner be changed, altered or modified without the written consent of the officers" of the company. When the vendor's agent concluded a three days' trial of the engine, under the contract, the purchaser was not satisfied with its performance. The agent, however, represented that the engine would get better with wear and that if it was not right the company would make it right, and upon this representation the purchaser was induced to settle for the purchase-price. The Court held, on the evidence, that the vendors did not deliver such an engine as was called for by the order, the one delivered being incapable of developing the rated horse-power, and the purchaser was justified in rejecting it. Also that the vendors, by their conduct, were estopped from denying the agent's authority to make the representations which he made.

Schofield v. Emerson Brantingham Implement Co., 43 D.L.R. 509, 57 Can. S.C.R. 203, [1918] 3 W.W.R. 434, reversing 38 D.L.R. 528, 11 S.L.R. 11.

II. Warranty.

A. IN GENERAL.

(§ II A—25)—FARM IMPLEMENT ACT—SECOND-HAND MACHINERY—GROUND FOR REJECTION.

Held, that different considerations arise on a sale of second-hand machinery from those arising on a sale of new machinery. Consequently where, on the sale of a second-hand kerosene-burning engine by a farmer, a necessary attachment was without the knowledge of the parties, missing, such defect did not warrant a rejection of the engine or a refusal to pay therefor, inasmuch as the missing part, while essential to the operation of the engine, was easily procurable at almost any place of business and very inexpensive, costing only a few cents. Held further, that the provision of the Farm Implement Act (1915), ch. 28) applies only to dealers in implements and not to a farmer making an isolated sale of a second-hand engine.

Robinson v. Burgeson, 11 S.L.R. 229, [1918] 2 W.W.R. 879.

FARM IMPLEMENT ACT—PAROL EVIDENCE—COLLATERAL AGREEMENT.

Quære, whether the Farm Implement Act, 1915, ch. 28, applies to an individual sale by a farmer of a second-hand implement. Evidence is admissible to shew that a written contract for the sale of farm machinery was subject to collateral verbal agreements or conditions [Brownsberger v. Harvey, 2 S.L.R. 481, followed]. On the sale of a farm engine of a stated horse-power the ability of the engine to develop such horse-power is a condition [Hart-Parr Co. v. Wells, 40 D.L.R. 169].

J. I. Case Threshing Machine Co. v. Welsh (B.C.), [1918] 3 W.W.R. 57.

FARM MACHINERY—AMBIGUOUS DESCRIPTION—RATED POWER—NOTICE OF DEFECTS—ACCEPTANCE—SET-OFF.

The defendants agreed to purchase from the plaintiff an engine described as "One Case 40 Horse Power Case Gas Engine." The plaintiff delivered an engine which, however, failed to develop its rated horse-power when operated on kerosene, and when operated on gasoline burned an excessive quantity. Experts sent by the plaintiff to demonstrate the engine's ability instructed the defendants, upon the failure of the engine to operate on kerosene, to go ahead with their work on gasoline and that an expert more familiar

with the kerosene type of engine would be procured and the engine made to operate on kerosene. The defendants accordingly proceeded to operate the engine on gasoline, but it consumed such an excessive quantity thereof that its operation was either altogether unprofitable or much less profitable than it should have been. The agreement provided that the purchaser should not be entitled to make any claim for breach of warranty unless he complied with certain provision as to the giving of notice of defects, and the defendants did not comply therewith. The plaintiff, failing to make the engine operate satisfactorily on kerosene, the defendants continued to keep and operate the engine on gasoline. In an action on promissory notes given for the purchase-price, held that the description of the engine in the order was ambiguous, and that evidence was admissible to shew what type of engine was intended. That, on the evidence, the engine ordered was a kerosene-burning engine that would develop 40 horse-power, and that the vendors had failed to deliver such engine, and that such failure was a breach of condition to which the provision as to the giving of notice did not apply. That in any event the vendor, having in a manner not contemplated in the order undertaken by its own agents a test or demonstration, and thus acquired a more accurate knowledge of defects than could be contained in a written notice, the purpose for which the sending of notice was intended, had disappeared and the failure to send notice could not be set up. That the defendants were entitled to set off in reduction of the purchase-price the diminution in value of the engine delivered over that of the engine ordered. [Hart-Parr v. Wells, 11 S.L.R. 132, applied.]

J. I. Case Threshing Machine Co. v. Mitten, 11 S.L.R. 238, [1918] 2 W.W.R. 871, affirmed in 44 D.L.R. 40.

FARM MACHINERY— 'STRAW BURNER."

Where there has been a sale of a threshing engine with a "straw burner," the fact that the buyer has some trouble in burning straw therewith is not a ground for holding that he did not get a "straw burner."

Nichols & Shepard v. Chamberlain, (Sask.), [1918] 3 W.W.R. 305.

ANIMALS KNOWN TO BE DISEASED—DUTY TO WARN.

On a sale, without warranty, of an animal known to the seller to be affected with a certain contagious disease. there is no common-law duty upon the seller to warn the buyer of the disease, where the latter is reputed to be possessed of more than ordinary skill and knowledge in the treatment of animals, the disease in question is fairly common in the neighbourhood, the buyer knows that the animal is suffering from some complaint, although not the particular nature of it, and the buyer refuses to complete the sale until he has had the animal in his possession a certain time [Ward v. Hobbs, 4 App. Cas. 13, followed; Urch v. Strathcona Horse Repository, 2 A.L.R. 183, and the interpretation therein put on Ward v. Hobbs differed from; Clarke v. Army and Navy Co-operative Society, [1903] 1 K.B. 155, distinguished.]

O'Mealey v. Swartz (Sask.), [1918] 3 W.W.R. 98, 11 S.L.R. 376.

EXPRESS AND IMPLIED WARRANTIES—BREACH —LOSS OF PROFITS.

An express warranty on the sale of farm machinery that "the vendor does not give any warranties with this machinery other than the following: Machine is to be in good repair," excludes all implied warranties [Sawyer-Massey Co. v. Ritchie, 43 Can. S.C.R. 614, applied]. Knowledge on the part of the seller of goods of the purpose for which the buyer wants the goods is not in itself sufficient to charge the seller with loss of profits resulting from a breach of warranty, the seller must be shewn to have known that the buyer agreed to buy believing that the seller accepted the contract with the attached condition that he would be liable for loss of profits on a breach of warranty. [Leonard v. Kremer, 11 D.L.R. 491, applied].

Rivers v. George White & Sons Co. (B.C.), [1918] 3 W.W.R. 61.

ACTION FOR PRICE—COUNTERCLAIM FOR FRAUDULENT MISREPRESENTATION AS TO VALUE — FRAUD OR WARRANTY NOT ESTABLISHED.

Gardner v. Merker, 14 O.W.N. 357, 43 O.L.R. 411, 44 D.L.R. 217.

B. BY DESCRIPTION.

(§ II B—30)—"GELDING"—"RIGGOT."

An agreement for sale being for a "gelding," there is an implied condition that the subject of the sale shall be the "gelding" of horse-dealing commerce; this condition is not complied with by the delivery of a "riggot," although both parties honestly believed at the time of sale that it was a gelding and in a proper action the purchaser is entitled to damages.

Twaites v. Morrison (Alta.), 43 D.L.R. 73, [1918] 3 W.W.R. 349, 14 A.L.R. 8.

(§ II B—31)—SCREENED COAL.

A contract for the delivery of "screened coal" is carried out by the delivery of coal properly screened at the mine, although owing to the soft and friable nature of the coal more slack is produced in transit than would be produced from coal from other mines.

Maritime Coal, Railway & Power Co. v. Clark (N.B.), 43 D.L.R. 158 (annotated).

C. OF QUALITY, GENUINENESS, OR FITNESS.

(§ II C—35)—SALE OF MOTOR-TRUCK—KNOWLEDGE OF VENDOR OF PURPOSE OF PURCHASER—ARTICLE DELIVERED NOT REASONABLY FIT FOR PURPOSE—FINDING OF TRIAL JUDGE ON EVIDENCE—TRUCK SOLD BY MANUFACTURER NOT OF HIS OWN MANUFACTURE — IMPLIED WARRANTY — PROPERTY IN TRUCK NOT PASSING TO PURCHASER UNTIL PAYMENT IN FULL—

RIGHT OF PURCHASER TO RESCIND—RETURN OF MONEY PAID AND PROMISSORY NOTES—INTEREST.

Randall v. Sawyer-Massey Co., 15 O.W.N. 74.

INFERIOR QUALITY—ACTION BY VENDEE FOR DAMAGES—FRUIT PACKED IN BASKETS—CHARGE OF "FACING"—FAILURE TO PROVE—FRUIT SALES ACT, R.S.O. 1914, CH. 225, SEC. 2—EVIDENCE—"ORCHARD-RUN."

Scott v. Fisher, 14 O.W.N. 217.

SOUNDNESS OF ANIMAL.

The written statement of a veterinary surgeon, read at the public sale of a mare, "that he had the mare under his care for abscess caused by strangles, but that she would soon be cured without difficulty," only expresses the opinion of the veterinary surgeon and does not constitute a warranty by the vendor. (By the Superior Court.) A Court cannot annul a sale if such nullity is not asked for in the written pleadings.

Poupart v. Beaudin, 24 Rev. Leg. 149.

ANIMAL—LATENT DEFECT.

Intermittent lameness is a latent and redhibitory defect. The exchange of a horse suffering from such lameness, due to a hard tumor on the horse's shank, when the owner declares to the party with whom he makes the exchange that such lameness is accidental and curable, is void and may be set aside.

Rochon v. Lavigne, 24 Rev. Leg. 112.

A mare inclined to become frightened and unmanageable has a latent defect which renders the sale of such an animal void.

Charron v. Longtin, 24 Rev. Leg. 109.

(§ II C—35a)—BY SAMPLE—DELIVERY—ACCEPTANCE—OBLIGATIONS.

Pauss v. Wright, 40 D.L.R. 156, 53 Que. S.C. 375.

GRAIN SOLD BY SAMPLE—APPROPRIATION TO CONTRACT OF PARTICULAR CAR-LOAD SPECIFIED IN BILL OF LADING—ACCEPTANCE OF DRAFT—FAILURE TO DELIVER GRAIN—RECOVERY BY BUYER OF AMOUNT PAID—WRONG CAR-LOAD DELIVERED BY REASON OF MISTAKE AS TO NUMBER OF CAR—CAR-LOAD ACTUALLY DELIVERED IN DAMAGED CONDITION.

McPherson v. Niagara Grain and Feed Co., 14 O.W.N. 271, affirmed in 15 O.W.N. 385.

SALE BY SAMPLE—INFERIOR GOODS DELIVERED — DAMAGES — MEASURE OF—RIGHT OF VENDOR TO TAKE OVER GOODS AT REDUCED PRICE.

John Hallam Limited v. Bainton, 15 O.W.N. 82.

D. EFFECT OF INSPECTION; OR OPPORTUNITY TO INSPECT.

(§ II D—40)—DUTY TO EXAMINE—AGENT—LIABILITY.

One who buys hay for another and does not inform the vendor, letting him believe it is for himself, is personally liable. A purchaser should examine the thing sold on taking possession, and his default in doing so prevents him afterwards from complaining of apparent defects which it may have.

Dumaine v. Comeau, 24 Rev. Leg. 105.

(§ II D — 44) — ENGINE — WARRANTY — HORSE-POWER.

A clause in a contract for the purchase of an engine requiring notice to be given in case of any defect in "workmanship or material" does not apply to a warranty that the engine will develop certain horse-power, but only to the warranty that it is well made and of good material.

Hart-Parr Co. v. Wells (Can.), 43 D.L.R. 686, [1918] 3 W.W.R. 776, affirming 40 D.L.R. 169, 11 S.L.R. 132, [1918] 2 W.W.R. 239,

III. Rights and remedies of parties.

A. IN GENERAL.

(§ III A—50)—BROKER—OPTION—LAPSE OF TIME—QUANTUM MERUIT.

At the expiration of the time limit in an option agreement with a broker, the owner is entitled to consider the matter at an end, unless the broker can shew either that there was an entirely new agreement, or that the terms of the old option were either by express agreement, or by implication continued until the sale was effected, he can only recover on the basis of a quantum meruit. [See annotation 4 D.L.R. 531.]

Ackles v. Beatty (N.S.), 40 D.L.R. 130.

NON-DELIVERY—MEASURE OF DAMAGES.

Held, that the rule for measuring damages for non-delivery of goods laid down in the Sales of Goods Act (R.S.S. 1909, ch. 147, sec. 49 (3)), namely, that where there is an available market the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been delivered is inapplicable where the price has been prepaid, and that in such case, if the market price is higher at the time of trial than at the time specified for delivery, the damages are to be measured by the latter price.

Peebles v. Pfeifer, 11 S.L.R. 249, [1918] 2 W.W.R. 877.

DISPUTE AS TO VALUE—MISTAKE OF VENDOR IN "APPROVAL BILL"—KNOWLEDGE OF VENDEE—PRICE AGREED UPON.

J. L. Michaelson & Sons, Limited v. Babb, 15 O.W.N. 86.

PRICE OF GOODS PAYABLE PARTLY IN MONEY AND PARTLY BY DELIVERY OF GOODS IN EXCHANGE—REFUSAL OF BUYER TO ACCEPT—REPUDIATION OF CONTRACT—GOODS NOT APPROPRIATED TO CONTRACT UNTIL AFTER NOTICE OF REPUDIATION—BREACH OF EXECUTORY CONTRACT—DAMAGES FOR—CLAIM FOR WHOLE PRICE OF GOODS AND DAMAGES FOR NON-DELIVERY OF GOODS IN EXCHANGE—PROPERTY IN GOODS NOT TO PASS UNTIL

PAYMENT—SPECIAL CONTRACT FOR PAYMENT OF MONEY BASED ON DELIVERY OF GOODS—REASONABLE TIME FOR DELIVERY—ACTUAL DAMAGE RESULTING FROM BREACH OF CONTRACT.

Mason & Risch v. Christner, 15 O.W.N. 186.

ACTION FOR PRICE—ITEMS OF CLAIM—COUNTERCLAIM FOR DAMAGES FOR BREACH—EVIDENCE—ONUS—CLAIM FOR RETURN OF MONEY PAID—DISMISSAL OF PART OF COUNTERCLAIM—RESERVATION OF LEAVE TO SET UP IN NEW ACTION—APPEAL—COSTS.

Hall Motors v. F. Rogers & Co., 15 O.W.N. 231.

ACTION IN DIVISION COURT UPON PROMISSORY NOTE GIVEN FOR PART OF PRICE—WARRANTY — BREACH — DISPUTE-NOTE NOT SETTING UP COUNTERCLAIM ON WARRANTY—VERDICT OF JURY IN EFFECT AWARDING DAMAGES BY DEDUCTION OF SUM FROM AMOUNT OF NOTE—JUDGMENT—APPEAL—COSTS.

Fanning v. Wales, 15 O.W.N. 259.

DEFECTS—ACTION—REASONABLE TIME.

When a purchaser accepts and keeps goods which he has bought, and later commences an action in damages against the vendor, on the ground of defects which he discovered in the goods after their delivery, he must bring his action within a reasonable time.

De Felice v. O'Brien, 27 Que. K.B. 192. [Appeal to Supreme Court of Canada pending.]

ANIMAL—REDHIBITORY ACTION—DELAY.

A redhibitory action, commenced 30 days after the sale of a horse, is not brought within a reasonable delay, when the purchaser might have ascertained the animal's defects the day after the contract and when the parties live in the same place.

Suthergill v. Portelance, 24 Rev. Leg. 473.

ASSUMPSIT—ATTACHMENT.

If goods are delivered to a person who asserts that he never bought them, but who refuses to return them, the plaintiff's action should be in revendication or payment of their value in default of their being returned, and not by an action of account for sale and delivery of goods.

Léger v. Viau, 53 Que. S.C. 501.

AUCTION SALE—LIABILITY OF PURCHASER—DELAY—DAMAGES.

As a general rule the purchaser of goods sold at public auction, who does not immediately pay the price at which the article was knocked down to him, must pay damages for his failure to do so. Nevertheless, if such person had been in the habit, for many years, of buying at the same auction rooms, and that according to the custom of the vendor he was always granted a delay of three, five or even eight days, he should not be held responsible for his default in payment unless the vendor at the opening of the bidding had given notice that no delay would be allowed for payment for goods sold.

Montreal Fruit Auction Co. v. Payne, 53 Que. S.C. 503.

SALE OF SUBSTITUTED GOODS—INVESTMENT OF PROCEEDS IN GOVERNMENT SECURITIES—CONDITIONS.—C.C. (QUE.) ARTS. 953a, 951 (a)—R.S.Q. ARTS. 5899, 5893.

Re Smith, 54 Que. S.C. 512.

(§ III A—52)—INSPECTOR'S CERTIFICATE—DELIVERY—WARRANTY AS TO QUALITY—BURDEN OF PROOF.

Montreal Abattoirs v. William Davies, 41 D.L.R. 747, 24 Rev. Leg. 180.

(§ III A—53)—QUANTITY—RESCISSION.

A purchaser of a quantity of cord-wood of a stated measurement, among which the vendor delivered wood of a shorter length than that stipulated, may keep the wood by paying the contract price for the quantity delivered. He is not bound to ask for an annulment of the sale or refuse the wood on such ground.

La Pierre v. Pelchat, 20 Que. P.R. 212.

WEIGHING.

A sale of an undetermined quantity of tobacco, which is drying on the ground at the rate of so much a pound, is not a sale in lump or by weight. In a sale by weight, if the purchaser refuses to accept and weigh the goods sold, the vendor may, after offering to to determine the weight and to deliver it, weigh it himself and claim the price from the purchaser.

Jubinville v. Lafond, 54 Que. S.C. 377.

(§ III A—54)—DELIVERY F.O.B.

When goods are bought f.o.b. at New York, the freight from New York to Montreal to be paid by the purchaser, the delivery of the goods to a railway company designated by the latter entirely frees the vendor from all responsibility, which from that time falls on the purchaser.

Spiegelberg v. Helleur, 24 Rev. Leg. 147.

(§ III A—57)—DELIVERY—TIME—BREACH OF WARRANTY.

Where a valid sale is made of goods in existence and ready for delivery when the sale is made, the contract of sale not being severable, and the property in the goods passing to the purchaser at the time of the sale; the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term in the contract express or implied to that effect. Where no time is mentioned a contract must be executed within a reasonable time.

Armand v. Noonan, 41 D.L.R. 433, 41 O.L.R. 551.

B. LIEN FOR PRICE.

(§ III B—60)—TERMS OF PAYMENT—TIME.

In the absence of any mention of a time limit within which the payment of goods sold

and delivered was to be made it will be held that the vendor is entitled to claim payment immediately on the delivery of the goods. A sale of effects made under the following conditions: "Terms, September, October, November and December, net 25%" means that the goods were sold for their face value and were to be paid, without any discount deducted or interest added, by four equal payments during the months respectively.

Horton v. Deeb, 54 Que. S.C. 35.

C. Rescission.

(§ III C—70)—Mineral claim—Third party.

A sale of mineral claim, by a person having the right to convey title, will not be set aside at the instance of one claiming an interest under an unwritten agreement where there has been no fraud on the part of the purchaser, especially if there has been delay in bringing the action.

Reynolds v. Jackson (Sask.), 41 D.L.R. 168.

Delivery in instalments—Default.

The failure of a seller of lumber who had contracted to ship the lumber at regular intervals to ship the anticipated quantity, held not to entitle the purchaser to repudiate the contract.

Meadowcreek Lumber Co. v. Adolph Lumber Co. (B.C.), [1918] 2 W.W.R. 466, 25 B.C.R. 298. [Reversed by Supreme Court of Canada.]

Acceleration clause—Default—Waiver.

Although a contract for the sale of goods on the instalment plan contains an acceleration clause making the full amount of the unpaid purchase-price due and payable on default in payment of any instalment, yet if the seller accepts an overdue payment, without objection, he cannot take advantage of such clause in respect to the delay in the payment of such instalment.

Advance Rumely Thresher Co. v. Grenier (Man.), [1918] 3 W.W.R. 497.

Resiliation clause.

An "ipso facto" resiliation clause is not a power given the vendor to cancel the contract, but the contract continues to exist so long as the vendor has not shewn his intention of cancelling it. The vendor, therefore, may always, if he sees fit, ask the fulfilment of the contract. If the vendor seeks the enforcement of the resiliation clause, he must return the money and things he has received.

Lesage Packing Co. v. Lesage, 53 Que. S.C. 491.

(§ III C — 72) — Misrepresentation — Remedy — Rescission — Action for breach of warranty.

The provisions of the Sales of Goods Ordinance (Alta.) are not inconsistent with the right of a purchaser to be relieved from a sale induced by a fraudulent misrepresentation as to a material fact; his remedy in such case is by rescission and restitution, and not for an action for breach of warranty.

Lynch v. Jackson, 38 D.L.R. 61, 13 A.L.R. 344.

Fraud and misrepresentation—Sale of company shares—Return of money paid with interest—Principal and agent—Evidence.

Seagram v. Kemish, 14 O.W.N. 187, affirming 13 O.W.N. 321.

Assignment—Fraud—Joinder of plaintiffs.

A vendor to whom a purchaser has transferred a pretended debt in partial payment of the price of a sale, may demand that the transfer be annulled on the ground of fraud and claim the price of sale from the purchaser. Such a demand does not annul the sale itself.

Comtois v. Pesant, 24 Rev. de Jur. 566.

(§ III C—74)—Acceptance without inspection—Goods unmerchantable.

A purchaser who accepts delivery and resells the material purchased, shipping it a long distance without making any examination as to its quality or condition, is guilty of imprudence; on the goods proving unmerchantable he is entitled to have the contract rescinded and the purchase money returned but not to damages for freight demurrage or loss of profits.

Diamonde Metal Co. v. Standard Paint Co. of Canada, 41 D.L.R. 129, 24 Rev. de Jur. 193.

Rejection of goods—Delay—Tender—Payment.

When a vendor, upon the complaint of the purchaser that the thing sold is defective, undertakes to take it back, asking delay for doing so, the purchaser is no longer bound to bring his action for cancellation of the sale within a reasonable time after the sale. He can make use of his recourse any time before prescription is acquired. A purchaser who sues his vendor for cancellation of a sale is only bound, in making a legal tender, to request the vendor to come and take the thing sold, wherever it is. A defendant cannot allege default or insufficiency of tender when he refuses to pay in any case.

Boivin v. Les Allumettes de Drummondville, 54 Que. S.C. 337.

IV. Bulk sales.

(§IV—90)—Sale en bloc—Creditors—Payment.

The transferees of the sale price of a business sold en bloc for a price payable by monthly instalments, when the vendor undertook that he would himself pay all his creditors, have no right to claim from the purchaser the payment of one of the instalments so long as those creditors have not been paid, inasmuch as up to that time, under art. 1569a C.C. (Que.), the sale is null as far as the creditors are concerned.

Duhamel v. Graves, 24 Rev. Leg. 388.

The nullity declared in secs. 1569a et seq. as a penalty for non-compliance with the formalities requisite to the validity of a sale en bloc, is not absolute but relative. It can be invoked only by creditors whose claims are prior to the sale and not by the curator in insolvency of the estate of the vendor, for the benefit of all the creditors, whose claims are subsequent to the deed attacked.

Gagnon v. La Banque Nationale, 54 Que. S.C. 259.

SALE OF GOING CONCERN—LIST OF CREDITORS —OMISSION.

There is no legal relation between the creditor of a trader and the purchaser of the latter's business, if his name does not appear on the sworn list of creditors furnished by the vendor; and the creditor cannot sue the purchaser to recover what the vendor owes him.

St. Amour v. Pusie, 54 Que. S.C. 386.

SCHEDULE.

In assignment for creditors, see Assignment for Creditors.

SCHOOLS.

I. IN GENERAL.
- A. Legislative power; constitutionality of statutes.
- B. Admission; attendance; tuition.
- C. Health regulations.
- D. Suspension; control over pupil.

II. TEACHERS.
- A. Employment; qualification.
- B. Compensation; salary.
- C. Removal; dismissal.
- D. Liability of teacher.

III. OFFICERS AND ELECTIONS.
- A. Officers.
- B. Elections.

IV. DISTRICTS AND PROPERTY; SCHOOL TAXES.

V. BOOKS; INSTRUCTIONS.

Annotation.

Denominational privileges; constitutional guarantees: 24 D.L.R. 492.

I. In general.

A. LEGISLATIVE POWER; CONSTITUTIONALITY OF STATUTES.

See Constitutional Law.

B. ADMISSION; ATTENDANCE; TUITION.

(§ I B—10)—RESIDENCE—RATES.

There is no duty cast upon a school board to receive within its schools children who are not resident within its own municipal district.

Patterson v. Victoria School Trustees, 24 B.C.R. 365.

TRANSPORT OF PUPILS—MANDAMUS—DISCRETIONARY MATTER.

The powers of the Superior Court, by virtue of art. 50 of C.C.P., do not extend to matters which are discretionary. So, the court cannot order school commissioners to transport children free of charge to schools of a school municipality, seeing that the Act states that they "may" do it "if necessary," and that, consequently, it is not imperative but only optional.

Lacroix v. La Commission d'Ecoles pour la Municipalité de la Pointe Claire, 53 Que. S.C. 88.

II. Teachers.

(See previous Annual Digests.)

III. Officers and elections.

A. OFFICERS.

(§III A—55)—BORROWING—VAGUE RESOLUTION—AUTHORIZATION—RATIFICATION.

A resolution adopted by school commissioners authorizing their secretary-treasurer "to borrow in the name of the school commission a few hundred dollars to meet expenses of betterments and repairs, and for the reduction of debts," does not give the right to this officer to contract a debt upon a note of $1,100 with interest at 6% per annum. A resolution authorizing an indeterminate and indefinite borrowing, leaving to the secretary-treasurer the discretion of determining the amount to borrow, is illegal and ultra vires. It follows that the note given by the secretary-treasurer in the name of the school commission for such loan is void. In order that there may be ratification by the principal he must have knowledge of the agents excess of his powers and have the willingness to ratify it. So the negligence of the school commissioners to check over the accounts of that secretary-treasurer, who had illegally contracted a loan, is not a ratification of his conduct if they were ignorant of what he had done. (By Judge Carroll) arts. 232 and 234, et seq, of the School Code, which requires the authorization of the superintendent of public instruction and of the Lieutenant-Governor-in-council, and which impose certain formalities in order to contract a loan, apply only to loans of a permanent character which require the issue of debentures or bonds, but does not affect temporary loans for costs of administration.

School Commissioners of Ste. Elisabeth v. Lafrenière, 27 Que. K.B. 73.

IV. Districts and property; school taxes.

(§ IV—70)—PUBLIC SCHOOLS ACT—HIGH SCHOOL.

The true construction of sec. 15 of the Public Schools Act (R.S.B.C. 1911, ch. 206) is that public school includes high school, and a city municipality school district has a right to collect fees from a district municipality school district whose pupils attend its high schools.

City of Victoria v. District of Oak Bay, 38 D.L.R. 238, 24 B.C.R. 516, [1918] 1 W.W.R. 158, affirming 34 D.L.R. 734.

SCHOOL TAXES—NOTICE.

An assessment for school taxes in the name of one who has no interest in the land and is not the occupant thereof, and failure to send any notice of assessment whatever to the owner of the property renders the assessment

void. [The King v. Town of Grand Falls, 13 D.L.R. 266; Riesbech v. Creighton, 12 D.L.R. 363, followed.]

Wallbridge v. Steenson and Waseca School District Board of Trustees, 41 D.L.R. 330, 11 S.L.R. 224, [1918] 2 W.W.R. 801.

NEW SCHOOL SITE—CONSENT OF RATEPAYERS — ARBITRATION — CONSTRUCTION OF PUBLIC SCHOOL ACT.

McDonald v. School Dist. of Earl Grey (Man.), 38 D.L.R. 747, [1918] 1 W.W.R. 112.

(§ IV—74)—NOTICE OF ASSESSMENT.

To be effective in any one year, notice required to be given under sec. 43 of the School Assessment Act (Sask. Stats. 1915, ch. 25) must be given before the completion of the assessment roll.

Gratton Separate School v. Regina Public School, 38 D.L.R. 217, 10 S.L.R. 455, [1918] 1 W.W.R. 16, affirming 35 D.L.R. 158.

UNION SCHOOL SECTIONS—APPORTIONMENT OF TAXES.

The assessors of municipalities comprising a union school section under the Public Schools Act (R.S.O. 1914, ch. 266) have power under sec. 29 (1) of the Act to apportion the amount to be paid respectively for school purposes, and in so doing should equalise the assessments in the municipalities, having regard to the actual values of the properties assessed. They are not bound by the values appearing on the assessment rolls and any irregularity in the manner of determining the amounts, does not afford an excuse for failure to levy and collect the sums required.

Eastview Public School Board v. Township of Gloucester, 40 D.L.R. 707, 41 O.L.R. 327, 13 O.W.N. 295, reversing 12 O.W.N. 372.

SEPARATE SCHOOLS—ASSESSMENT.

Where the minority ratepayers in a district have established a separate school under the School Act (Sask. Stats. 1915, ch. 23, sec. 39) all the ratepayers of the same religious denomination in the district are bound to contribute to the support of such school; a ratepayer of the same religion cannot elect to be a supporter of another school.

City of Regina v. McCarthy, 43 D.L.R. 112, [1918] A.C. 911, 119 L.T. 661, [1918] 3 W.W.R. 302, affirming 32 D.L.R. 741, 10 S.L.R. 14.

DIVISION OF DISTRICT—VALUATION OF TAXABLE REAL ESTATE.

When a school district is divided by the formation of a new district, the part in which the school-house is situated retains the property thereof, making a refund to the other part. The amount of such refund is established proportionately to the value of the real estate of the two sections of the divided district at the time of its division, and not to their respective values at the time of the construction of the school house.

Marcotte v. Les Commissaires d'Ecoles de Portneuf, 54 Que. S.C. 12.

TAXABLE PROPERTY—TELEPHONE LINE.

The poles and wires of a telephone line do not constitute a taxable property under the terms of art. 2521, para. 15, of R.S.Q. (Public Instruction Act), and are not subject to the imposition of school taxes.

Les Commissaires d'Ecoles de St. Alphonse v. Continental Heat & Light Co., 53 Que. S.C. 385.

V. Books; instructions.

(See preyious Annual Digests.)

SEAMEN.

LIEN FOR NECESSARIES—FISHING SCHOONER —"FISHING-STORES."

Held, that "fishing-stores" or tackle, such as hooks, gaffs, nippers and knives, used by a schooner employed in the business of halibut fishing are to be considered as necessaries.

Pichon v. The "Alliance No. 2," 17 Can. Ex. 201, 20 D.L.R. 70, 20 B.C.R. 560.

LIENS FOR EQUIPMENT—NECESSARIES—SEAMAN'S WAGES—PRIORITY.

A lien for "building, equipping or repairing" a ship under sec. 4 of the Admiralty Court Act, 1861, or one for necessaries, cannot take priority over a lien for seaman's wages. [Munsen v. The Comrade (1902) 7 Can. Ex. 330, commented on.]

Re The "Aurora," 17 Can. Ex. 203, 20 B.C.R. 92.

WAGES—JURISDICTIONAL AMOUNT.

The jurisdiction of the Exchequer or Admiralty Court under the Canada Shipping Act (R.S.C. 1906, ch. 113, sec. 191), over claims for seamen's wages, depends upon the amount of recovery, not the amount sued on. Where the amount of recovery is less, although the amount sued on is more than $200, the Court is without jurisdiction. Several such claims may be consolidated into one action in order to confer jurisdiction.

Cowan v. The "St. Alice," 17 Can. Ex. 207, 21 B.C.R. 540.

WAGES—MASTER OF SHIP—JURISDICTIONAL AMOUNT.

Under the Canada Shipping Act (R.S.C. 1906, ch. 113, sec. 194) the master of a ship is put upon the same basis as a seaman as regards the jurisdictional amount for the enforcement of claims for wages.

Beck v. The "Kobe," 24 D.L.R. 573, 17 Can. Ex. 215, 22 B.C.R. 169.

SEAMAN'S WAGES—SHIP'S ARTICLES—"LAY" AND "BONUS."

Plaintiff sued for a balance of wages as pilot on a whaling steamer at the rate of "$50 per month and lay," as entered on the ship's articles. The articles provided also for the payment of a bonus to the members of the crew at the termination of the whaling season, stipulating, however, that should any of the persons who had signed such articles leave the employment of the owners of the ship, or be discharged for cause, before the determination of the whaling season, such persons should forfeit all claims to a bonus

There was no such provision applied to the "lay," the amount of which earned in addition to wages at any period during the whaling season being liquidated and set out in a table of lays embodied in the articles. The plaintiff did not remain in the said employment for the period mentioned, but voluntarily signed off the ship's articles in a port at which the ship touched before the expiry of the season. Held, upon a proper construction of the ship's articles, that while the plaintiff had forfeited any right to a "bonus" by leaving the ship before the end of the whaling season, he has not thereby prejudiced his right to credit on his wages for the amount of his lay.

Farrell v. The "White," 17 Can. Ex. 219, 20 B.C.R. 576.

PILOTAGE RIGHTS—QUEBEC HARBOUR.

The Act 4-5 Geo. V., ch. 48, has not abrogated all the powers of the corporation of the pilots for the harbour of Quebec. The Act has only taken away from it the powers concerning the relations between ship owners and the public in general with the pilots, and has left the rights affecting only the pilots themselves and their relations, privileges and obligations as members of the corporation of pilots. The order-in-council of May 8, 1915, adopted in virtue of that Act, and which orders that the account of pilotage of a ship shall be paid to the pilot himself, only intends to indicate the person to whom the ship agent must pay the pilotage dues. It does not declare the pilot the owner of those dues; the latter must immediately turn them over to the pilots corporation so that they may be divided between all its members according to the law of 1860.

Pilots Corporation of Quebec Harbour v. Paquet, 27 Que. K.B. 409, 53 Que. S.C. 220.

SEARCH AND SEIZURE.

See also Levy and Seizure; Intoxicating Liquors.

(§ I—4)—SEARCH WARRANT—SUFFICIENCY.

An information to obtain a search warrant under sec. 629 of the Criminal Code (Form 1) need not be signed by the complainant if he in fact takes his oath before the magistrate as to its truth; such information must state the cause of suspicion, whatever it may be, as provided for in such form. The search warrant issued by the magistrate as provided by Form 2 of sec. 629 is invalid if it does not describe the things to be searched for and the offence in respect of which the search is made, and a search made under such warrant is illegal.

Rex v. La Vesque, 42 D.L.R. 120, 30 Can. Cr. Cas. 190, 45 N.B.R. 522.

SECOND OFFENCE.

See Criminal Law; Summary Convictions; Intoxicating Liquors.

SECURITY.

See Costs, I—14; Appeal.

SEDUCTION.

(§ II—7)—PREVIOUSLY CHASTE CHARACTER.

"Previously chaste character" of a girl, as it concerns the offence of seduction (Cr. Code secs. 211 and 212), is not limited in its meaning to the physical condition of virginity, and notwithstanding that condition at the time of the alleged offence it may be shewn in defence of the charge by her admissions or otherwise that the girl had previously committed acts of gross immorality with a man and had exhibited a disposition for lewdness.

Rex v. Fiola (Que.), 41 D.L.R. 73, 29 Can. Cr. Cas. 125.

SEIZURE.

See Levy and Seizure.

SENTENCE.

See Criminal Law, IV; Summary Convictions; Certiorari.

SEPARATE ESTATE.

Of married woman, see Husband and Wife.

SEPARATE SCHOOLS.

See Schools.

SEQUESTRATION.

Annotation.

The writ of sequestration, its origin and scope; 14 D.L.R. 855.

PETITION TO APPOINT SEQUESTRATOR.

Art. 286 C.C.P. (Que.) applies in all cases where there is a contestation in an action, or on an incident in a case, e.g., on a petition to appoint a sequestrator.

Bourdon v. Payette, 20 Que. P.R. 24.

SEQUESTRATOR — POWER OF APPELLATE COURT TO APPOINT—SEPARATION ACTION —ALIMONY—WIFE'S ESTATE.

The Court of Review has power to grant the appointment of a sequestrator. Such application will be granted in favour of a wife who has obtained a separation from bed and board and an alimentary pension against her husband, if the latter continues to administer his wife's property and collects its revenues without paying anything.

Weingart v. Jacobson, 24 Rev. Leg. 369.

LAND—RIGHT TO DOCUMENTS—ACCOUNTING.

A sequestrator appointed to administer real property has the right to obtain from the parties heretofore in possession thereof all titles, contracts and documents whatsoever concerning the said property, but not an account of his administration thereof.

Evans v. Ogdensburg Coal & Towing Co., 20 Que. P.R. 261.

SERVANTS.

See Master and Servant.

SERVICE.

See Writ and Process; Pleading; Motions and Orders.

SERVITUDE.

See Easements.

SEWERS.

See Drains and Sewers; Municipal Corporations.

SHAREHOLDERS.

See Companies.

SHERIFF.

See Levy and Seizure; Execution; Interpleader.

(§ I—3)—Poundage fee—Interpleader.

A sheriff is not entitled to a poundage fee where the claimant of the goods seized succeeds on an interpleader issue, although the seizure was made under the explicit instructions of the solicitors for execution creditors.

A. McDonald Co. v. Cushing (B.C.), [1918] 3 W.W.R. 89.

Poundage—Taxation of sheriff's bill without formal appointment served on execution creditor—Re-taxation unnecessary — Motion to reduce poundage — Forum — Costs — Unnecessary contest.

Carson v. Martin, 14 O.W.N. 76.

Sheriff's fees—Seizure of immovables.

A sheriff has no right to a fee for searches in the registry office, but may appoint a bailiff and pay him a fee and his travelling expenses. He may charge for his report. If the instructions to the sheriff divide the lots to be seized into two blocks, without specifying that the lots should be sold as one property, and without any permission to sell en bloc being obtained, the sheriff has a right to a fee upon the additional lots.

Lamothe v. Dulude, 20 Que. P.R. 93.

SHIPPING.

See Collision; Admiralty; Seamen; Carriers.

Annotations.

Collision of ships: 11 D.L.R. 95.

Contract of towage; duties and liabilities of tug-owner: 4 D.L.R. 13.

Liability of a ship or its owner for necessaries: 1 D.L.R. 450.

Collisions on high seas; jurisdiction: 34 D.L.R. 8.

SIDEWALKS.

See Highways.

SIGNALS.

See Automobiles; Railways; Carriers; Street Railways; Master and Servant.

SLANDER.

See Libel and Slander.

SOLDIERS.

See Military Law.

Volunteers and Reservists Relief Act, see Moratorium.

Annotation.

Desertion from military unit; 31 D.L.R. 17.

SOLICITORS.

I. Right to practise.
A. Admission.
B. Disbarment.
C. License.
II. Relation to client.
A. In general; liability.
B. Authority.
C. Compensation; lien.
D. Summary proceedings.
III. Remedies against; motions.

Annotation.

Acting for two clients with adverse interests: 5 D.L.R. 22.

I. Right to practise.

B. Disbarment.

(§ I B—10)—Breach of Bar Act—Circulars.

The distribution by a person not holding a diploma of an advocate, of circulars by which he offers his services to conscripts to give them information upon the proceedings to take in order to obtain exemption from military service, constitutes a breach of the Bar Act of the province of Quebec.

Le Barreau de la Province de Quebec v. Picard, 54 Que. S.C. 455.

Disbarment — Appeal — Notice — Rules of Law Society.

In order to constitute a valid notice of appeal from disbarment or disqualification by the Benchers of the Law Society, the grounds of appeal must be set forth as specified in rule 96 of the Rules of the Law Society and the failure to do so deprives the Judges of the Supreme Court of jurisdiction to hear the appeal. There is no appeal from the refusal of the Benchers to reinstate a disbarred barrister or disqualified solicitor. Semble, sec. 41 of the Legal Professions Act requires that all the Judges of the Supreme Court must sit on an appeal from disbarment or disqualification by the Benchers.

Re Legal Professions Act and Hall, 24 B.C.R. 226.

II. Relation to client.

C. Compensation; lien.

See Costs, II—26.

(§ II C—30)—Liability for professional services.

Two business men, who together consult an attorney, are both liable for the payment of his fees unless they make the attorney understand that his services are required on account of another person.

Meagher v. Walsh, 24 Rev. Leg. 471.

A client who engages the services of an advocate practising apparently in partnership with other advocates, who pays for his services, cannot be called on to pay again to the partnership even though such advocate was only an employee.

Brodeur v. Duclos, 53 Que. S.C. 514.

(§ II C—35)—Lien on money paid into Court—Settlement.

In the absence of collusion between the parties to an action, to deprive a solicitor of his costs, he is not entitled to a lien on moneys paid into Court to abide the event of the action, upon subsequent settlement by the parties themselves.

Tropox v. Droney, 39 D.L.R. 133, 13 A.L.R. 39, [1918] 1 W.W.R. 540.

III. Remedies against; motions.

(See previous Annual Digests.)

SPECIFIC PERFORMANCE.

I. Right to remedy.
A. In general.
B. Oral contracts.
C. Subject-matter of contracts in general.
D. Contracts relating to personal property.
E. Contracts for real property.
II. Decree of judgment.

Annotations.

Ground for refusing the remedy: 7 D.L.R. 340.

Jurisdiction; contract as to lands in a foreign country: 2 D.L.R. 215.

Oral contract; Statute of Frauds; effect of admission in pleading: 2 D.L.R. 636.

Sale of lands; contract making time of essence; equitable relief: 2 D.L.R. 464.

When remedy applies between vendor and purchaser: 1 D.L.R. 354.

Specific performance of agreements for company debentures: 24 D.L.R. 373.

Vague and uncertain contracts: 31 D.L.R. 485.

I. Right to remedy.

A. In general.

(§ I A—9)—Vendor and purchaser.

Specific performance of an agreement for sale of land with abatement will not be granted where the vendor has expressly represented that he was not the owner of all the land conveyed and could not sell all of it without having his act ratified.

Wilson v. Patterson (Alta.), 39 D.L.R. 642, [1918] 1 W.W.R. 999.

E. Contracts for real property.

(§ I E—30)—Sale of land—Registered plan.

A purchaser who agrees to purchase lots according to a registered plan is bound by the agreement; whether the registered plan creates a restrictive covenant or not is immaterial; if the vendor offers the purchaser exactly what he agreed to buy specific performance will be enforced.

Sumner v. McIntosh, 40 D.L.R. 301, 11 S.L.R. 152, [1918] 2 W.W.R. 293, affirming 35 D.L.R. 336, 10 S.L.R. 63.

Sale of land—Time of essence—Extension.

Specific performance of an agreement for sale of land will be enforced, notwithstanding a clause making time of the essence, and that the contract is to be null and void if the interest is not promptly paid when due; if the vendor agreed to an extension of the time of payment and the notice definitely fixing the time in which payment must be made is unreasonable in the circumstances. [Kilmer v. B.C. Orchard Lands, 10 D.L.R. 172, [1913] A.C. 319, followed; Steedman v. Drinkle, 25 D.L.R. 420, [1916] 1 A.C. 275, referred to.]

Tooley v. Hadwen, 41 D.L.R. 190, 13 A.L.R. 447, [1918] 2 W.W.R. 812.

Agreement for sale of land—One purchase contemplated—Different parcels owned by husband and wife separately — Wife not joined as party—Statute of Frauds.

Kidd v. Millar, 40 D.L.R. 729, 13 A.L.R. 282, [1918] 2 W.W.R. 366.

Agreement—Transfer—Right of transferee to lien.

An action lies for specific performance of an agreement for the sale of land, notwithstanding the transfer of the property to another purchaser, if such transferee knew, at the time of the transfer, of the prior agreement and there was no antecedent binding agreement between him and the owner, sec. 35 of the Land Titles Act is not a bar to the plaintiff's claim to set aside the title; [Sydie v. Saskatchewan Land Co., 14 D.L.R. 51]; but the Court should not direct the setting aside of the transfer and the certificate of title issued thereon until the plaintiff specifically performs his agreement to purchase; the proper course is to direct that the title of such transferee is subject to the rights of the plaintiff under his agreement and that leave be reserved to him to apply at any time for an order directing the setting aside or cancellation of the transfer and certificate of title. The transferee should be declared entitled, in the event of the transfer and certificate of title being set aside, to a lien as against the transferor of the balance of the purchase money payable by the plaintiff.

Ross v. Stovall (Alta.), [1918] 2 W.W.R. 975, 13 A.L.R. 521.

Agreement for sale of land not in Ontario—Action for balance of purchase-money — Specific performance—Jurisdiction of Supreme Court of Ontario—Ability to shew good title and to convey—Reference.

Thompson v. Gatchell, 13 O.W.N. 449.

Agreement for sale of land not in Ontario—Covenants for payment of purchase-money—Action upon—Defence—Fraudulent representations and promises—Failure to prove—Equitable defence — Hardship — Want of mutuality—Relief against enforcement of agreement by in effect awarding specific performance—Modification of judgment for payment of purchase-money by pro-

VIDING THAT UPON PAYMENT TITLE MUST BE SHEWN.
McMillan v. Pink, 14 O.W.N. 212.

AGREEMENT FOR SALE OF LAND—ACTION BY VENDOR FOR SPECIFIC PERFORMANCE—MISREPRESENTATIONS BY VENDOR—FAILURE TO PROVE—EVIDENCE—CREDIBILITY OF WITNESSES—PURCHASER CHOOSING TO ACT UPON HIS OWN JUDGMENT—INSPECTION OF LAND—FAILURE TO SEEK AVAILABLE INFORMATION—PURCHASER ESTOPPED FROM SAYING THAT HE WAS DECEIVED—PRESENCE OF NOXIOUS WEEDS—IMPOSSIBILITY OF PLACING PARTIES IN ORIGINAL POSITION—FAILURE OF CLAIM FOR RESCISSION.
Ferris v. Edwards, 14 O.W.N. 311, affirmed in 15 O.W.N. 361.

(§ I E—33)—RESCISSION—NOTICE—TENDER OF TITLE—REASONABLE TIME.
A letter by the purchasers to the vendor, giving notice of intention to rescind the contract if completion should be delayed beyond a named reasonable time, having been made impracticable by the act of the vendor's agent in stating a wrong address in the agreement, and the vendor's neglect to rectify the error, prevents such vendor from insisting on this condition of the right of rescission. The failure of the vendor to prepare and tender, within a reasonable time, the transfer which was to have been prepared disentitles such vendor to ask for specific performance of the agreement. [Brickles v. Snell, 30 D.L.R. 31, [1916] 2 A.C. 599, and Steedman v. Drinkle, 25 D.L.R. 420, [1916] 1 A.C. 275, referred to.]
Simson v. Young, 41 D.L.R. 258, 56 Can. S.C.R. 388, [1918] 2 W.W.R. 62, reversing 33 D.L.R. 220, 10 A.L.R. 310.

II. Decree or judgment.
See Vendor and Purchaser; Land Titles.

SPEED.
See Automobiles; Railways; Street Railways.

SPEEDY TRIAL.
See Criminal Law; Summary Convictions.

STARE DECISIS.
See Courts, V.

STATUTE OF FRAUDS.
See Contracts.

STATUTE OF LIMITATIONS.
See Limitation of Actions; Adverse Possession.

STATUTES.
I. ENACTMENT; VALIDITY.
A. Enactment.
B. Time of passage and taking effect.
C. Validity; in general.
D. Judicial examination; legislative journals.
E. Entitling; expression of subject.
F. Plurality of subjects.
G. Local or special legislation.
II. CONSTRUCTION; OPERATION; EFFECT.
A. In general; use of words.
B. Strict or liberal construction.
C. Adopted or re-enacted statutes.
D. Prospective or retrospective operations.

I. Enactment; validity.

C. VALIDITY IN GENERAL.

(§ I C—25)—EXTRA PROVINCIAL CORPORATIONS ACT—INVALID IN PART.
The provisions of the Extra Provincial Corporations Act, R.S.O. 1914, ch. 179, except the latter part of sec. 16 (1) are intra vires in so far as they apply to a company incorporated under the Dominion Companies Act, R.S.C. 1906, ch. 79, for carrying on business in Ontario, and with its chief place of business in Ontario, such company is precluded from carrying out its objects and undertakings in Ontario until it becomes licensed; it is subject to the penalties prescribed in the Act for carrying on business, and is prohibited from holding lands for the purposes of its business without being licensed under the Act. That part of sec. 16 which provides that so long as a company remains unlicensed it shall not be capable of maintaining any action or other proceeding in any Court in Ontario in respect of any contract made in whole or in part within Ontario in the course of or in connection with business carried on contrary to the provisions of sec. 7 is ultra vires. [John Deere Plow Co. Ltd. v. Wharton, [1915] A.C. 330, 18 D.L.R. 353 (annotated), distinguished.]
Currie v. Harris Lithographing Co., 41 D.L.R. 227, 41 O.L.R. 475, reversing 40 O.L.R. 290.

G. LOCAL OR SPECIAL LEGISLATION.

(§ I G—82)—MUNICIPAL ASSESSMENT ACT—IMMATERIAL OMISSION.
The Municipal Assessment Act (R.S.M. 1913, ch. 134) although in part adopted from the Ontario Act, differs from it in that it contemplates that resident and non-resident owners shall be put upon a practical equality; the omission of the assessor to insert the word "non-resident" in the column for names of owners as required by sec. 20 of the Manitoba Act is a formal not a material matter, and when the address is inserted after the name the defect is cured by sec. 63 of the Act. [Berlin v. Grange, 1 E. & A. 279, distinguished.]
Bifrost v. Houghton, 39 D.L.R. 650, 28 Man. L.R. 484, [1918] 1 W.W.R. 797.

II. Construction; operation; effect.

A. IN GENERAL; USE OF WORDS.

(§ II A—95)—GRAIN ACT—APPLICATION.
Sec. 218 of the Canada Grain Act (Can. Stats. 1912, ch. 27) applies only to transactions in which the buyer purchases grain in car lots irrespective of quantity; not to purchases of a definite quantity.
Tainter v. McKinnon, 39 D.L.R. 483, 13 A.L.R. 54, [1918] 1 W.W.R. 776.

DOG TAX AND SHEEP PROTECTION ACT—RIGHT OF CLAIMANT.

A claimant under the Dog Tax and Sheep Protection Act (R.S.O. 1914, ch. 246) has a right of action to compel the council and valuer to comply with the provisions of the Act, as far as may be necessary to give effect to a valid claim; but has no right of action in the nature of an appeal against the determination of the council or the valuation of the valuer. [Sec. 18 as amended by 6 Geo. V. ch. 56 (3), considered; Re Hogan v. Township of Tudor (1915), 34 O.L.R. 571, distinguished.]

Hogle v. Township of Ernesttown, 41 D.L.R. 123, 41 O.L.R. 394.

MORTMAIN ACTS—DOMINION COMPANY—"HIS MAJESTY."

A Dominion company is subject to and bound to obey the statutes of the province as to mortmain. The words "of a statute for the time being in force" contained in sec. 3 of the Mortmain and Charitable Uses Act, R.S.O. ch. 103, apply only to a statute of the Province, and the words "His Majesty," where they first occur in the same section, mean His Majesty acting by the Lieutenant-Governor of the province, and where they occur the second time, mean His Majesty in right of the province. The Act is an Act of general application.

Currie v. Harris Lithographing Co., 41 D.L.R. 227, 41 O.L.R. 475, reversing 40 O.L.R. 290.

CALGARY CHARTER ACT—AMENDMENT—BY-LAW.

The Act to amend the Calgary Charter Act ((1917) Alta., ch. 45, sec. 19) which provides that a by-law to enforce the early closing of retail shops, shall, before coming into force, be submitted to the "electors" and carried by a "majority vote" of said electors requires that the by-law be carried by a majority of the electors actually voting, not of those entitled to vote. A special provision of the legislature in regard to the submission of a by-law to the electors, avoids the necessity for compliance with the general provisions relating to the same class of by-law.

Re Young and Glanvilles, 39 D.L.R. 629, 13 A.L.R. 265, [1918] 2 W.W.R. 352.

CONSTRUCTION — JUDGMENT CREDITOR — TRUST DEED FILED WITH REGISTRAR OF JOINT STOCK COMPANIES—LAND REGISTRY ACT. R.S.B.C. 1911, CH. 127.

Gregory v. Princeton Collieries; Re Execution Act, 40 D.L.R. 739, 25 B.C.R. 180, [1918] 1 W.W.R. 265.

PUBLIC OR PRIVATE STATUTES.

A statute which has not been declared to be a private act is a public act; however, if it only concerns a locality on the private rights of a group of individuals, it is not general and cannot affect the rights of third persons who are not specially named. The application of a statute should be kept within the limits of the objects which it embraces and for which it is enacted.

Dutremblay v. Lanouette, 53 Que. S.C. 6.

(§ II A—96)—REPUGNANCY—LATER ACT.

Where the provisions of a general Act cannot be read consistently with and cannot be made to harmonise with the provisions of a later special Act the special Act governs. The lapse of a company's free miners' certificate required by the Placer Mining Act, 1891 B.C., ch. 26; R.S.B.C. 1897, ch. 136, does not invalidate a lease granted by later special Act (1894) B.C., ch. 3) which is ratified and declared binding by a subsequent special Act (B.C. 1895, ch. 5).

Quesnel Forks Gold Mining Co. v. Ward and Cariboo Gold Mining Co. (B.C.), 42 D.L.R. 476, [1918] 3 W.W.R. 230.

PROVINCIAL AND DOMINION STATUTES—CONFLICT.

When a given field of legislation is within the competence both of the Parliament of Canada and of the Provincial Legislature, and both have legislated, the enactment of the Dominion must prevail over that of the province where the two are in conflict.

Rex v. Thorburn, 39 D.L.R. 300, 41 O.L.R. 39, 29 Can. Cr. Cas. 329.

LIQUOR ACT—REPEAL—EFFECT.

The repeal of sec. 40 of the Liquor Act (Alta.) as it stood in 1917 and the substitution of the new sec. 40 of 1918 has the effect of confining within the new section a conviction against sec. 23 before the defendant can be charged with having committed a second offence.

Rex v. Fox, 42 D.L.R. 650, 13 A.L.R. 535, [1918] 3 W.W.R. 197, 30 Can. Cr. Cas. 232.

SUPREME COURT ACT—AMENDMENT.

The amendment of the Supreme Court Act of 1915 was intended to ameliorate the position of a defendant against whom a judgment is recovered. The amendment does not give the Court power to commit a debtor for contempt of Court in not obeying an order for the payment of money by instalments in cases not provided for by secs. 15 and 19 of the Arrest and Imprisonment for Debt Act (R.S.B.C. 1911, ch. 12).

Royal Bank v. McLennan (B.C.), 41 D.L.R. 27, [1918] 2 W.W.R. 225.

OPIUM AND DRUG ACT—VALIDITY OF CONVICTIONS UNDER.

The Opium and Drug Act (1-2 Geo. V. 1911, Can., ch. 17, sec. 3) contemplates that a penalty shall be imposed on each person offending, not that each offence shall be punished; a conviction against two or more persons jointly and a joint order to pay a fine are therefore invalid, and will be quashed.

The King v. James (N.S.), 39 D.L.R. 377, 29 Can. Cr. Cas. 204.

(§ II A—104)—MUNICIPAL CLAUSES ACT—IMPERATIVE AND DIRECTORY CLAUSES.

Sub-sec. 142 of sec. 50 of the Municipal Clauses Act of British Columbia (32 B.C. Stat. 1906) which provides that "every by-law . . . shall before coming into effect be published in the "British Columbia Gazette," and in some newspaper published in the

municipality," is imperative and not merely directory; publication is a necessary condition to the validity of the by-law.

City of Victoria v. Mackay, 41 D.L.R. 498, 56 Can. S.C.R. 524, [1918] 2 W.W.R. 610, reversing 39 D.L.R. 450, 25 B.C.R. 23, [1918] 1 W.W.R. 863.

DIVISION COURTS ACT—SUM IN DISPUTE.

The words "sum in dispute" in sec. 125 of the Division Courts Act, R.S.O. 1914, ch. 63, mean "sum in dispute in the action"—"the sum sought to be recovered" mentioned in sec. 106.

Marshall v. Holliday, 43 D.L.R. 245, 42 O.L.R. 597.

C. ADOPTED OR RE-ENACTED STATUTES.

(§ II C—115)—STATUTE ADOPTED FROM ENGLAND—ADMIRALTY CRIMES.

Sec. 591 of the Criminal Code (1906) having been taken from sec. 3 of the Territorial Waters Jurisdiction Act, 1878, Imp., it should be construed according to the application and definitions to which the corresponding enactment in the latter Act was subject. (Per Chisholm, J.). [R. v. Keyn, 2 Ex. D. 63 (Franconia case), referred to.]

Rex v. Neilson, 40 D.L.R. 120, 30 Can.Cr. Cas. 1, 52 N.S.R. 42.

D. PROSPECTIVE OR RETROSPECTIVE OPERATIONS.

(§ II D—125)—QUEBEC GAME LAWS—CERTIORARI—APPEAL.

Where a revised statute declares that a conviction under the prior law shall be considered as a conviction for a similar offence against the revised Act, this implies retroactivity of the new law as to the remedy against a conviction rendered after the revised Act came into effect upon a complaint laid before that time. [Quebec & Lake St. John Ry. v. Vallières, 23 Que. K.B. 127, referred to.]

Hudson Bay Co. v. Dion, 38 D.L.R. 477, 52 Que. S.C. 69, 28 Can. Cr. Cas. 265.

STAY OF PROCEEDINGS.

Of actions affected by war, see Moratorium.

Stay of execution, see Execution.

Annotations.

Of actions by alien enemies: 23 D.L.R. 375.

Actions affected by moratorium: 22 D.L.R. 865.

PENDING MOTION FOR NEW TRIAL—TERMS.

There is no general rule governing the terms which the Court or a Judge should impose on granting an application to stay proceedings pending a motion for a new trial.

Farnell v. Conway, 45 N.B.R. 6.

ADMISSION OF LIABILITY—NO PAYMENT INTO COURT—ASSESSMENT OF DAMAGES—APPEAL FROM—MOTION FOR STAY—TERMS OF STAY.

Bowen v. Canadian Northern R. Co. (Alta.), [1918] 2 W.W.R. 536.

MOTION FOR—MENTAL CAPACITY OF PLAINTIFF—AUTHORITY FOR CONTINUANCE OF ACTION—COSTS.

Thede v. Hessenauer, 15 O.W.N. 111.

DILATORY EXCEPTION—WARRANTY.

A defendant cannot obtain the suspending of proceedings against him in order to call in warranty a party against whom he has instituted a principal action on the ground mentioned in his dilatory exception and still pending.

La Banque Nationale v. Jean, 19 Que. P.R. 207.

STIPENDIARY MAGISTRATE.

See Justice of the Peace.

STOCK BROKERS.

See Brokers.

STREET RAILWAYS.

I. FRANCHISES; CONSTRUCTION.
II. MOTIVE POWER.
III. OPERATION.
A. in general.
B. Duty and care of railway company.
C. Contributory negligence.

See also Carriers; Railways.

As to safety of place and appliances, see Master and Servant.

Findings of jury as to negligence, see Trial.

Annotation.

Reciprocal duties of motormen and drivers of vehicles crossing the tracks: 1 D.L.R. 783.

I. Franchises; construction.

(§ I—1)—TICKETS "FOR BENEFIT OF WORKING PEOPLE."

The Act incorporating the Nova Scotia Tramways and Power Co. (N.S. Acts 1914, ch. 180, sec. 22, as amended by 1917, ch. 53, sec. 2), providing that the company shall, "for the benefit of the working people," issue tickets at a certain price to be used during special hours, subject to such terms and conditions as the Board of Commissioners of Public Utilities may approve, does not justify the Board in making an order requiring the company to issue such tickets for the benefit of any person presenting them who boards the cars during those hours.

Re Nova Scotia Tramways and Power Co., 39 D.L.R. 657, 52 N.S.R. 17.

AGREEMENT—RATE PER MILE—LIABILITY—DAMAGES.

A railway company which is obligated under a by-law granting it the right under certain conditions to construct, maintain and operate an electric railway, to pay an agreed rate for every mile or pro rata for a portion of a mile of railway operated, is liable to pay only for the portion of railway actually operated if, however, the effect of the by-law is that the whole railway is to be operated, the company is liable in damages for non-performance of this condition, the damage

being equal to the amount the company would have had to pay had the whole line been operated.

County of Wentworth v. Hamilton Radial Electric R. Co., 41 D.L.R. 199, 41 O.L.R. 524, 13 O.W.N. 331, affirming 12 O.W.N. 379.

AGREEMENT WITH CITY CORPORATION—PERCENTAGE OF GROSS RECEIPTS—ACTION FOR — COUNTERCLAIM — ACCOUNT — ITEMS—INTEREST—COSTS.

City of Toronto v. Toronto R. Co., 15 O.W.N. 31.

REMOVING SNOW AND ICE FROM STREETS—LIABILITY—JURISDICTION OF COURT.

Held, that the Court had jurisdiction to entertain an action to recover a sum which the city corporation, the plaintiff, alleged it was compelled to expend in removing snow and ice from certain streets of the city in consequence of a breach of contract and negligence on the part of the defendant company. It was not a case in which the Ontario Railway and Municipal Board had exclusive jurisdiction, under sec. 22 of the Ontario Railway and Municipal Board Act, R.S.O. 1914, ch. 186. The corporation was not compelled to make an application to the Board, under sec. 21, for redress in respect of something that the company ought to have done and failed to do. Sec. 5 of an Act "respecting certain matters pertaining to the City of Toronto," 63 Vict. ch. 102 (O.), is not repealed by the Ontario Railway and Municipal Board Act. And held, upon consideration of the provisions of sec. 25 of the Act incorporating the Toronto Railway Company, 55 Vict. ch. 99 (O.), and of conditions 21 and 22 of the agreement of the 1st September, 1891, as construed by sec. 25, that the company had not carried out the obligations imposed upon it with regard to the removal of snow and ice; and that the corporation was entitled to recover the sum expended by it in doing what the company ought to have done, and also interest on that sum.

City of Toronto v. Toronto R. Co., 42 O.L.R. 603, affirmed 15 O.W.N. 229.

AGREEMENT WITH MUNICIPAL CORPORATION—REMOVAL OF TRACKS—INJUNCTION.

New Toronto Board of Trade v. Village of New Toronto, 14 O.W.N. 326.

II. Motive power.

(§ II—15)—SALE OR LEASE OF SURPLUS ELECTRICITY—56 VICT. CH. 97, SEC. 9—RIGHT TO PLACE POLES AND WIRES ON HIGHWAY — EVIDENCE — JUDGMENT OF APPELLATE COURT—EFFECT OF.

Sandwich Windsor and Amherstburg Railway v. City of Windsor, 15 O.W.N. 15.

III. Operation.

B. DUTY AND CARE OF RAILWAY COMPANY. See also Carriers.

(§ III B—25)—NEGLIGENCE—INVITATION TO ALIGHT WHILE CAR MOVING.

The opening of the door of a street car by the conductor at a regular stopping place is prima facie an invitation to alight; and if the car is moving slowly so that a reasonably careful passenger thinks the car has stopped, it is negligence on the part of the company.

Gazey v. Toronto R. Co., 38 D.L.R. 637, 40 O.L.R. 449, 22 Can. Ry. Cas. 233.

NEGLIGENCE — CAUSAL CONNECTION BETWEEN INJURY AND OCCURRENCE.

Montreal Tramways Co. v. Mulhern, 39 D.L.R. 758, 55 Can. S.C.R. 621, affirming 26 Que. K.B. 456.

INJURY TO PERSON FALLING IN CROSSING TRACK—NEGLIGENCE OF MOTORMAN—DISTANCE OF CAR FROM PLACE OF FALL—FINDING OF JURY—DAMAGES—ASSESSMENT BY JURY OF LARGE BUT NOT EXCESSIVE SUM—MONEY-LOSS—LOSS OF EARNING POWER—PAIN AND SUFFERING—PERMANENT INJURY—AGED WOMAN.

Racicot v. Ottawa Electric Co., 14 O.W.N. 210.

INJURY TO PERSON IN HIGHWAY BY OUTWARD SWING OF REAR STEPS OF CAR IN ROUNDING CURVE—DUTY OF CONDUCTOR—NEGLIGENCE—PROXIMATE CAUSE OF INJURY—DAMAGES—CLAIM AGAINST CITY CORPORATION—COSTS.

Barr v. Toronto R. Co. and City of Toronto, 15 O.W.N. 192.

DUTY TO WOMAN PASSENGER—PREGNANCY—RIOT — VERDICT — DAMAGES — NEW TRIAL.

A tramway conductor who permits a woman to enter the car during disorder or not, makes the tramway company liable; and if in the tumult the woman receives a blow which causes her a miscarriage, the company is liable for the damages which ensue. A miscarriage resulting from a fall is not too remote an injury to entitle the victim recourse; it is a direct injury which gives a right to compensation. There is nothing contradictory in a jury's verdict declaring that a woman was injured as the result of a wound inflicted on her by the conductor in pushing her back, and the fault of the company consisted in the conductor allowing the victim to get into the car when there was a brawl; the first act being the cause of the accident, the second is the fault of the company. A new trial, on the ground of error of the trial Judge, will not be granted unless actual prejudice has been caused thereby.

Montreal Tramways Co. v. McDonnell, 27 Que. K.B. 566.

INEXCUSABLE FAULT — SPEED — EVIDENCE—SIMILAR ACCIDENTS.

In a collision between a car of a tramways company and an emergency wagon, both going at an immoderate speed, at a dangerous street crossing, where several accidents had already occurred, it is inexcusable fault for

which the tramways company is responsible, due to the negligence of the motorman to diminish his speed. Acts which would not have constituted an inexcusable fault if the attention of the employer had not been called to them, become such fault if, for the purpose of economy and increase of its profits, it has neglected to take measures which were pointed out to it for the protection of its employees or the public. A plaintiff suing in damages by reason of a collision at a street crossing can give evidence of several accidents having already occurred at that place, and that the defendant had done nothing to prevent them, an inscription in law made to such evidence will be refused.

Montreal Tramways Co. v. Savignac, 27 Que. K.B. 246.

DERAILMENT OF CAR—LIABILITY.

The responsibility of a tramway company for an accident caused by the derailment of one of its cars, does not arise under art. 1054 C.C. (Que.) but is subject to art. 1053 C.C. (Que.).

Fortin v. Montreal Tramways Co., 54 Que. S.C. 428.

(§ III B—27)—NEGLIGENCE—BRAKES ON CARS RELEASED BY CHILDREN.

A company which, by its employees, without the authority of the owners of a railway, moves cars placed on a track at the top of a grade for the purpose of being unloaded further down the grade, and merely hand brakes them, without securely air braking and blocking them, assumes the risk of the cars being started down the grade by mischievous boys releasing the brakes, and is responsible for all resulting damage to life or property.

Geall v. Dominion Creosoting Co.; Salter v. Dominion Creosoting Co., 39 D.L.R. 242, 55 Can. S.C.R. 587, [1918] 1 W.W.R. 280, affirming 25 D.L.R. 543, 19 Can. Ry. Cas. 240. [See 43 D.L.R. 547.]

C. CONTRIBUTORY NEGLIGENCE.

(§ III C—140)—BOARDING MOVING CAR—JOLT—VERDICT—EVIDENCE.

Plaintiff, a passenger, got on the lower step of one of the defendant company's tramcars, after having been warned by the conductor not to get off until the car stopped, and was thrown off, as she claimed, by a jolt of the car. Assuming such jolt to have occurred there was nothing to shew that it was not one of the ordinary incidents of operating the car and no negligence on the part of the company was disclosed. Held, that plaintiff was not entitled to recover damages for injuries sustained and that the verdict rendered by the jury in plaintiff's favour, contrary to instructions of the trial Judge, must be set aside.

Whitford v. N.S. Tramways Co., 52 N.S.R. 105.

BOARDING MOVING CAR—"INVITATION"—SPEED—EVIDENCE—FINDINGS OF JURY.

The plaintiff, a workingman, elderly but active, was crossing from the north side of a street to the south with the intention of becoming a passenger upon an east-bound car of the defendants, which had reached a stopping place and was standing still, and which he could not enter except by the rear-door on the south side. The car began to move when he was about halfway across the street, but the motorman motioned him to go in front of the car, and stopped it; the plaintiff passed in front of the car and proceeded to the rear end of it; before he reached that end, the car had (without any signal from the conductor) begun to move slowly; the plaintiff attempted to step on; but, as he did so, the car gave "a sudden jolt forward," he failed to get on the step of the platform, fell, and was injured. At the trial of an action for damages for his injuries, there was no conflict of testimony; and the jury found: (1) that the plaintiff was invited by the motorman to get on the car when it was in motion; (2) that the danger of getting on the car when in motion was not so obvious that a reasonable man would not have accepted the invitation; (3) that the plaintiff's injuries were caused by the negligence of the defendants; (4) in "not seeing the passenger safely on the car;" (5) no contributory negligence:—Held (Riddell, J., dubitante), that the findings were such as reasonable men might make upon the evidence; and a judgment for the plaintiff was affirmed. Per Meredith, C.J.C.P.:—The conclusion that reasonable men could find that the car was stopped to take up the plaintiff being reached, the finding must be for the plaintiff on the question of the defendant's negligence; because it was negligent to put the car in motion again until the motorman was signalled by the conductor to do so. Proof of the fact that a person attempts to board or alight from a street-car in motion is not necessarily proof of contributory negligence. The question is, whether, in all the circumstances of the case, the attempt shews a want of that care which is ordinarily taken in the like circumstances. It must always be a question of circumstances, and generally a question for the jury. A standing car is not necessarily an invitation to enter, if an invitation be needed; neither is a slowly moving car a revocation of an invitation—if there were any—so long as the door is open and no attempt is made to prevent boarding or alighting. The word "invitation" is inappropriate and often misused. The defendants are carriers for hire obliged to carry, not those they invite, but every one willing to pay the fare. Per Lennox, J.:—There was evidence upon which the jury could reasonably reach their conclusions, and the judgment based on their findings could not properly be disturbed. Per Rose, J.:—If any invitation was to be found, it was to be found from all the acts sworn to—the stopping, the motion made by the motorman, and the starting slowly forward; and the jury might treat these acts as constituting an invitation to enter the car

when it was in motion. It was said that, whatever might be thought about the plaintiff trying to enter a slowly moving car, he ought to have desisted as soon as he found the speed increased. But, on the evidence, the plaintiff was confronted with a sudden emergency, and it was open to the jury to find that his perseverance in his attempt to enter the car was the result of an error of judgment, in that emergency, which ought not to be called negligent.

Hill v. Toronto R. Co., 40 O.L.R. 393.

SUB-CONTRACTORS.

See Mechanics' Liens.

SUB-LEASE.

See Landlord and Tenant.

SUBROGATION.

Annotation.

Surety; security for guaranteed debt of insolvent; laches; converted security: 7 D.L.R. 168.

(§ V—20)—MORTGAGE—ASSIGNMENT—NOTICE.

Subrogation to the position of a mortgagee will not be ordered where the party seeking the order has been guilty of negligence in not giving notice of the assignment of an agreement of sale of the lands covered by the mortgage.

Grace v. Kuebler, 38 D.L.R. 149, 12 A.L.R. 392, [1918] 1 W.W.R. 182. [See 33 D.L.R. 1, 39 D.L.R. 39, 56 Can. S.C.R. 1.]

SUBSTITUTION.

REVOCABILITY—GIFT INTER VIVOS—REGISTRATION—RENEWING.

Under the authority of legislation prior to the Code, a substitution, created by donation inter vivos in favour of children of the institute, is revocable by the mutual consent of the donor and donee, notwithstanding the prior acceptance of the latter. The contrary provision, contained in the fourth paragraph of art. 930 of C.C.P. is new law, even though not placed within brackets. Registration of a substitution need not be renewed after the bringing into force of the cadastral survey in order to preserve the rights of the substitutes.

Proulx v. Le Blanc, 27 Que. K.B. 103.

HYPOTHEC — LOAN — INTEREST — WILL — LEGISLATIVE AUTHORIZATION — SUBSTITUTE—MUNICIPAL TAXES.

Although an Act adopted by the Quebec legislature, and a will creating a substitution, authorise the institute to borrow on the real estate substituted, without mentioning that the loan shall be made with interest, it must be construed that the institute is authorized to borrow by affecting the real estate for the payment of the interest. The capital and interest thus borrowed are chargeable to the substitute after the institute's death, both personally and hypothecarily. But they are liable for a sum borrowed by the institute without the assistance of the curator to the substitution. That debt is due by the institute's estate. If the money has been spent on the substituted assets, the recourse of the institute or his heirs against the substitute is governed by arts. 581, 582, 958 C.C. (Que.); that is, the substitutes have the right to have the improvements or greater repairs made by the institute removed; and if it cannot be done without deteriorating the property, they remain the property of the substitutes without indemnity. (Per Lamothe, J.)—The debt created by the imposition of a municipal tax, subsequent to the creating of a substitution, cannot in any way be considered as a previous debt, or privileged over the substitutes' right.

Perodeau v. Lacombe, 54 Que. S.C. 351.

SUCCESSION.

See Descent and Distribution; Wills; Executors and Administrators.

Succession duty, see Taxes, V.

SUFFRAGE.

See Elections.

SUMMARY CONVICTIONS.

I. GENERALLY.
II. JURISDICTION AND DUTY OF MAGISTRATE.
III. PROCEDURE.
IV. EFFECT.
V. PENALTIES AND COSTS.
VI. RECORD OF CONVICTION AND PROCEEDINGS.
VII. AMENDMENT.

Annotations.

Notice of appeal; recognizance; appeal; 19 D.L.R. 323.

Order for further detention on quashing conviction: 21 D.L.R. 649.

Appeal by "party aggrieved": 27 D.L.R. 645.

Pre-requisites on appeals from: 28 D.L.R. 153.

Prosecution for same offence after conviction or commitment quashed on certiorari: 37 D.L.R. 126.

Amendment of summary convictions: 41 D.L.R. 53.

I. Generally.

See Criminal Law; Certiorari; Indictment.

II. Jurisdiction and duty of magistrate.

(§ II — 20) — APPEARANCE — REGULARITY OF SUMMONS.

In order to give the magistrate jurisdiction to proceed in default of appearance in a summary conviction matter, there must have been service of a "summons" in conformity with Part XV. of the Criminal Code; service at different times of a copy of the complaint and of a written notice of the time and place of hearing the same is not sufficient although the notice was signed by both the magistrate and the complainant.

Lacasse v. Fortier (Que.), 30 Can. Cr. Cas. 87.

PRESENCE OF ACCUSED—IRREGULAR ARREST.

Summary conviction proceeding before a

justice are not invalidated by the circumstance that the accused was arrested to be brought before the justice without a warrant in a case where there was no right of arrest without a warrant. [R. v. Hughes, 4 Q.B.D. 614, applied.]

Rex v. Hanley, 30 Can. Cr. Cas. 63, 41 O.L.R. 177.

OPPORTUNITY FOR DEFENCE.

An accused person is not deprived of the opportunity of defence by the magistrate inadvertently assuming that the case was closed when the evidence for the prosecution was concluded and thereupon announcing the sentence, if before recording the conviction an opportunity to proceed with the defence was offered to counsel for the accused and he declined.

Rex v. Cyr, 38 D.L.R. 601, 12 A.L.R. 320, 29 Can. Cr. Cas. 77, affirming 12 A.L.R. 320.

EFFECT OF PENDING CHARGE.

A summary conviction will be quashed for want of jurisdiction if the magistrate, at the time he made the same, had pending before him another information against the accused for a similar offence arising out of the same circumstances and partly tried, and did not dispose of the same before entering upon the hearing.

Rex v. McManus (Alta.); 30 Can. Cr. Cas. 122.

OPIUM AND DRUG ACT—CERTIORARI—PLEA OF GUILTY.

Although the Opium and Drug Act, 1-2 Geo. V., Can., ch. 17, takes away the right to certiorari, proceedings by way of certiorari may be allowed to quash a summary conviction purporting to be made on a plea of guilty of "having opium in his possession without lawful or reasonable excuse" if the accused forthwith, after pleading guilty, and before a conviction was recorded, said to the magistrate that he did not know the contents of the package which he had just received at the time of his arrest. Such statement of the accused was, in effect, a statement of "sufficient cause why he should not be convicted" (Cr. Code sec. 721) and qualified his previous answer of "guilty," and thereafter the magistrate had no jurisdiction to proceed to conviction without taking evidence. [Colonial Bank v. Willan, L.R. 5 P.C. 417, specially referred to.]

Rex v. Richmond, 39 D.L.R. 117, 12 A.L.R. 133, 29 Can. Cr. Cas. 89,.

(§ II—21)—MALICIOUS DAMAGE—CLAIM OF RIGHT.

The magistrate's jurisdiction to try a charge under sec. 539 (for malicious damage generally) is ousted under sec. 540 only if the accused proves that he did the act complained of under a fair and reasonable supposition of right, which is a question for the magistrate to determine even if it involves some investigation of title to lands. [R. v. Davy, 4 Can. Cr. Cas. 28, applied.]

Ex parte Murphy; Rex v. Mullins (N.B.), 38 D.L.R. 625, 29 Can. Cr. Cas. 1.

III. Procedure.

(§ III—30)—ARREST WITHOUT WARRANT—JURISDICTION OF MAGISTRATE.

In the absence of any statutory provision in the Liquor License Act, Alta., enabling a peace officer to arrest without warrant a person whom he finds committing an offence under it, such an arrest is illegal, and the magistrate before whom the accused is brought in custody without a warrant or summons after such illegal arrest has no jurisdiction to proceed with the trial in the face of defendant's objection then taken that he was not properly before the magistrate. [Re Baptiste Paul (No. 2), 20 Can. Cr. Cas. 161, 7 D.L.R. 25, and R. v. Davis, 20 Can. Cr. Cas. 293, 7 D.L.R. 608, followed.]

Rex v. Pollard, 39 D.L.R. 111, 13 A.L.R. 157, 29 Can. Cr. Cas. 35.

TRIAL ON MERITS AFTER CONVICTION QUASHED—NEW SUMMONS.

When judgment is rendered by a justice of the peace imposing a fine upon a chauffeur for driving his automobile while in a state of intoxication, and this judgment is quashed by the Superior Court on technical grounds the complainant cannot continue the prosecution before a magistrate of the district on giving a mere notice to the accused or to his counsel, since the magistrate has no jurisdiction without the consent or acquiescence of the accused; (a) if there has been no adjournment of the case for several months; (b) if there has been no new summons to the accused, a mere notice not being sufficient; (c) if there has been no proceedings to put him in default and authorizing a trial and the conviction thereon in his absence.

Rhéaume v. Cliche (Que.), 30 Can. Cr. Cas. 112, 24 Rev. Leg. 61.

(§ III—31)—WRITTEN COMPLAINT.

Where a person is accused of an offence punishable on summary conviction by imprisonment, a complaint in writing should be made against him before he is called upon for his defence; a trial held on the defendant's arrest without warrant and without any information or complaint in writing, and without stating to the accused the nature and substance of the charge, is irregular, and the conviction thereon will be annulled on certiorari.

Nagazoa v. Niquet (Que.), 30 Can. Cr. Cas. 77, 24 Rev. de Jur. 339.

(§ III—33)—ADJOURNMENT—NOTICE.

Where the record of proceedings before the magistrate in a summary conviction matter does not shew any adjournment from the hearing to the date of conviction and sentence, nor does it appear that the accused was notified of the time when sentence would be pronounced, a summary conviction and sentence to imprisonment pronounced in his absence and subsequent to the hearing will be set aside on certiorari.

Nagazoa v. Niquet (Que.), 30 Can. Cr. Cas. 77, 24 Rev. de Jur. 339.

IV. Effect.

V. Penalties and costs.

VI. Record of conviction and proceedings.

(§ VI—65)—COMMON ASSAULT—PROTECTION FROM CIVIL PROCEEDINGS

Sec. 734 of the Criminal Code applies only to summary convictions, therefore it is only one who has been tried by a justice upon a charge of common assault—which is the only kind of assault punishable on summary conviction—who can claim protection from subsequent civil proceedings. One who has been tried summarily for one of the indictable offences specified in sec. 773 (c) is entitled to immunity under sec. 792 "from all further or other criminal proceedings for the same cause," but not from civil proceedings. [Nevills v. Ballard (1897), 28 O.R. 588, followed.]

Green v. Henneghan (Alta.), 43 D.L.R. 272, 14 A.L.R. 106, [1918] 3 W.W.R. 658.

VII. Amendment.

(§ VII—70)—AMENDMENT OF INFORMATION.

A conviction will not be quashed because the information has been amended in substantial respects, if the amendment has been made before the taking of evidence and the defendant has not been prejudiced by surprise.

Rex v. Van Fleet, 38 D.L.R. 592, 13 A.L.R. 320, 29 Can. Cr. Cas. 218, [1918] 1 W.W.R. 332.

(§ VII — 80b) — TEMPERANCE ACT — PROCLAMATION—PLEA OF GUILTY.

It is not open to a defendant, against whom a summary conviction awarding imprisonment has been made on his plea of guilty, to set up on habeas corpus that the conviction which expressly charged a violation of the Canada Temperance Act was invalid for lack of allegation or proof that the proclamation necessary to bring the Act into force in the district had in fact been issued; proof of the proclamation was dispensed with by the plea of guilty. [As to mode of proof of proclamations generally, see Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 21.]

O'Neil v. Carbonneau, 29 Can. Cr. Cas. 340, 54 Que. S.C. 417.

SUMMARY JUDGMENT.

See Judgment.

SUMMONS.

See Writ and Process; Summary Convictions.

SUNDAY.

SALE OF CIGARS AND SOFT DRINKS—QUEBEC LAW.

In the Province of Quebec sales on Sunday of fruit, sweets, cigars and non-intoxicating liquors to be consumed upon the premises are permissible, notwithstanding the Sunday Observance Act, R.S.Q. 1909, art. 4462 et seq., and the Lord's Day Act, R.S.C. 1906, ch. 153, sec. 16.

Spiliotopulos v. The King, 30 Can. Cr. Cas. 123, 27 Que. K.B. 79.

SUPREME COURT OF CANADA.

See Appeal; Courts.

SURETYSHIP.

See Principal and Surety; Bonds; Guaranty; Bills and Notes.

SURGEONS.

See Physicians and Surgeons.

TAXATION.

See Taxes; Costs.

TAXES.

I. POWERS OF TAXATION; WHAT TAXABLE.
- A. Taxation districts.
- B. Power of province or territory to tax federal agencies, instrumentalities and property.
- C. Equality; uniformity; discrimination; double taxation.
- D. For what purpose or use.
- E. What taxable.
- F. Exemptions.

II. WHERE TAXABLE; SITUS.

III. ASSESSMENT OF PROPERTY; ENFORCEMENT.
- A. In general; levy and apportionment.
- B. Assessment; valuation.
- C. Tax officers.
- D. Review; correction; equalization; appeal.
- E. Personal obligation; action for collection.
- F. Sale; deed, rights of purchasers.
- G. Redemption; notice to redeem.
- H. Who must pay; corporation taxes.
- I. Payment; tender; remedies as between individuals.
- J. Remission or abatement of taxes.
- K. Use of proceeds.

IV. LIEN.

V. SUCCESSION DUTIES.
- A. In general.
- B. Exemptions; uniformity.
- C. Persons, property, transfers and interests subject to tax.
- D. Assessment and collection.

VI. INCOME TAX.

Annotations.

Exemption from taxation: 11 D.L.R. 66.

Powers of taxation; competency of province: 9 D.L.R. 346.

Taxation of poles and wires: 24 D.L.R. 669.

I. Powers of taxation; what taxable.

Assessments for school purposes, see Schools.

A. TAXATION DISTRICT.

(§ I A—5)—SURTAX—RURAL MUNICIPALITY ACT.

Held, that the surtax provided for by the amendment to the Rural Municipality Act contained in sec. 4 of ch. 31 of the Statutes of Saskatchewan, 1912-13, does not belong to the municipality but to the Crown in the

right of the province, notwithstanding that the legislature has imposed upon the municipality the duty of levying and collecting the tax. The plaintiff's action, therefore, seeking to recover such tax for its own purposes, was dismissed with costs.

Rur. Mun. of Snipe Lake v. Martin, 11 S.L.R. 73, [1918] 1 W.W.R. 841.

SURTAX — VALIDITY — DIRECT TAXATION FOR PROVINCIAL PURPOSES.

The tax of six and one-quarter cents per acre imposed by the surtax provisions of the Rural Municipality Act, R.S.S. 1909, ch. 87, is direct taxation levied for the raising of a revenue for provincial purposes; those provisions are, therefore, valid. [Bank of Toronto v. Lambe, 12 App. Cas. 575; Dow v. Black L.R. 6 P.C. 272, applied.] When the Legislature invests the council of a municipality with authority to levy taxes for municipal purposes only, in the absence of specific direction to levy for other purposes, and where, by a subsequent enactment, the council is authorized to levy a specified tax without anything being said as to the application of the proceeds when collected, the presumption is that the council is to levy the specified tax for the only purpose for which it can legally impose taxation, namely, for the purposes of the municipality. [Rural Municipality of Snipe Lake v. Martin, [1918] 1 W.W.R. 841, not followed.]

Rural Municipality of Bratts Lake v. Hudson's Bay Co. (Sask.), [1918] 2 W.W.R. 962, 11 S.L.R. 357, affirmed in 44 D.L.R. 445.

E. WHAT TAXABLE.

(§ I E—45)—ASSESSMENT—"BUSINESS OF DISTILLER"—APPEAL.

Re Hiram Walker & Sons and Town of Walkerville, 38 D.L.R. 758, 40 O.L.R. 154.

EASEMENT—RIGHT OF WAY APPURTENANT—INTEREST IN LAND.

A right of way appurtenant exists solely for the benefit of the dominant tenement, and apart therefrom has no existence. It is not assessable as a separate interest, nor is it covered by an assessment of the dominant tenement; but the assessment of the servient tenement creates a charge on every interest in the land itself: vide the definition of land in clause 8 of sec. 2 of the Municipal Act, R.S.O. 1897, ch. 223, and secs. 7 and 149 of the Assessment Act, R.S.O. 1897, ch. 224, as to exemptions and liens. Land over which the defendants claimed a right of way was sold for taxes in 1901 and conveyed to the purchaser in 1902: Held, that the taxes assessed against the land became a charge upon that land and every interest in it, including any right of way to which the defendants might have been entitled; and the sale and conveyance of the land for taxes extinguished that right. [Tomlinson v. Hill (1855), 5 Gr. 231; Soper v. City of Windsor (1914), 32 O.L.R. 352; Re Hunt and Bell (1915), 34 O.L.R. 256, followed.]

A. J. Reach Co. v. Crosland, 43 O.L.R. 209, affirmed in 45 D.L.R. 140 (annotated), 43 O.L.R. 635.

(§ I E—53)—BUSINESS TAX — BANK — "PERSON."

A bank is a "person" according to the Interpretation Act, R.S.O. 1914, ch. 1, sec. 9 (x), and after it has transferred its assets to another bank is a "person removed from the municipality" within the meaning of sec. 95 (3) of the Assessment Act (R.S.O. 1914, ch. 195, added by 7 Geo. V., ch. 45 (9)).

City of Toronto v. Quebec Bank, 38 D.L.R. 708, 40 O.L.R. 544.

BUSINESS TAX — COMPANY — FRANCHISE — AMENDMENT OF CHARTER.

The amendment by ch. 33, 1916, of the charter of the defendant city held not to entitle it to impose a business tax upon the plaintiff company contrary to a contract made prior to the amendment whereby the city had agreed to limit the company's assessment to a fixed amount.

Hedley Shaw Milling Co. v. City of Medicine Hat (Alta.), [1918] 1 W.W.R. 754.

BUSINESS TAX—ASSIGNMENT FOR CREDITORS.

Goods subject to the charge imposed by the Calgary City Charter (sec. 25 (12), as amended by ch. 26, 1915, and ch. 32, 1916), in respect to the business tax remains subject thereto in the hands of an assignee for the benefit of the creditors of the person assessed, but there is nothing in the Charter making a tax on land a charge against goods, and since, under sec. 47 of the Charter, goods are not liable for such tax unless when seized they are the property of the person assessed, they are not liable when seized after they have been assigned for the benefit of such person's creditor.

Re Tardy (Alta.), [1918] 3 W.W.R. 137.

F. EXEMPTIONS.

(§ I F—75)—JUDGES.

A County Court Judge in Ontario is not exempt from municipal taxation under provincial legislation in respect of his salary or income as such Judge.

City of Toronto v. Morson, 38 D.L.R. 224, 40 O.L.R. 227, affirming 11 O.W.N. 195. [See 28 D.L.R. 188, 37 O.L.R. 369.]

MUNICIPAL EXEMPTION — CONTRACT —RENEWAL.

Art. 943 of the Municipal Code, authorising a local municipality to exempt from the payment of municipal taxes, for a period not exceeding 25 years, certain enterprise within its territory, applies only to trade, commerce, manufacture enterprises, and not to electric railways. A contract between a municipality and an individual, exempting an enterprise from taxation for the period of 20 years, with the stipulation that at the expiration of the 20 years the said exemption should be renewed for 10 additional years, must be construed in the sense that the municipality would be willing to renew that exemption for 10 years more, but that the exemption must be renewed after 20 years and a new contract signed.

City of Montreal v. Montreal Tramways Co., 54 Que. S.C. 87.

MUNICIPAL TAXES—SCHOOL TAXES.

School taxes are included in the term municipal taxes in any event where the burden of providing school revenue is upon the municipality. [C.P.R. v. City of Winnipeg, 30 Can. S.C.R. 558, applied.]

Grand Trunk Pacific R. Co. v. City of Edmonton (Alta.), [1918] 1 W.W.R. 943.

"EXCEPTIONAL TAX" — AGREEMENT — BREACH—SURTAX.

An "exceptional tax," within the meaning of clause 11 of the deed of surrender by the Hudson's Bay Co. of Rupert's Land to the Crown, means a tax exceptional as regards the company—one which imposes a burden of taxation on the lands of the company which is not imposed on the lands of other owners. [McGowan v. Hudson's Bay Co., 5 Terr. L.R. 147, followed]; nor does the fact that certain lands are bonâ fide exempted on grounds of public policy from a certain tax, make that tax exceptional; to constitute a breach of the contract the exemptions would have to be such that a court would be justified in concluding that they were not made in the bonâ fide exercise by the Legislature of its discretion, but that, under the guise of adopting certain lines of public policy, it was in reality endeavouring to place an undue burden of taxation upon the lands of the company. The surtax provisions of the Rural Municipality Act, R.S.S. 1909, ch. 87, do not contravene clause 11 of the Hudson's Bay Companys' deed of surrender of Rupert's Land.

Rur. Mun. of Bratts Lake v. Hudsons' Bay Co. (Sask.), [1918] 2 W.W.R. 962, 11 S.L.R. 357, affirmed in 44 D.L.R. 545.

UNEARNED INCREMENT TAX ACT — PERIOD OF EXEMPTION.

The exemption given by sub-sec. 3 of sec. 3 of the Unearned Increment Tax Act, ch. 10, 1913 (2nd sess.), is absolute, i.e., it is not limited to the first or any other transfer of the land, but entirely frees from the operation of the Act land of the character described in the sub-sec. during the continuance of the conditions giving rise to the exemption.

Re Witt (Alta.), [1918] 1 W.W.R. 612.

RAILWAY LANDS — AGREEMENT — FAILURE TO FILE PLAN.

Lands of which no plan has been filed or submitted for approval cannot be said to form part of the plaintiff's railway or to be lands used in connection with the operation thereof, so as to be exempt from taxation under par. 13 (e) of the agreement between the plaintiff and the province of British Columbia. [C.N.P.R. Co. v. New Westminster Corp., 36 D.L.R. 505 applied.] The meaning of said judgment of the Privy Council is that the filing of the plan does not in itself entitle the lands defined therein to exemption.

Canadian Northern Pacific R. Co. v. Corp. of Kelowna (B.C.), [1918] 3 W.W.R. 845, 44 D.L.R. 315.

(§ I F—85)—COLLEGE—LOCAL IMPROVEMENTS.

Upper Canada College not being a school maintained in whole or in part by a legislative grant or school tax, and being a college or seminary of learning would, by the Local Improvement Act, R.S.O. 1914, ch. 193, sec. 47, be liable to assessment for local improvements, but sec. 10 of the Upper Canada College Act, R.S.O. 1914, ch. 280, exempts it from all assessments, including local improvements, and the latter Act being a local Act is not repealed by the public general Act, and so being exempt from taxation, the college is not a necessary party to a petition for local improvements.

Upper Canada College v. City of Toronto, 38 D.L.R. 523, 55 Can. S.C.R. 433, affirming 32 D.L.R. 246, 37 O.L.R. 665.

HORTICULTURAL SOCIETY—TAX SALE—SETTING ASIDE.

Lot 1, block 207, district lot 546, in the district of North Vancouver, which is owned by the plaintiff Society and used for its own purposes, was sold for taxes alleged to be in arrears for the years 1913 and 1914. The lot was less than five acres in area. In an action to set aside the tax sale on the ground that the taxes were improperly imposed:—Held, that the lands in question were exempt by law from the taxes so imposed amd the sale should be set aside.

North Vancouver Horticultural Society and Farmer's Institute v. North Vancouver, 24 B.C.R. 290.

II. Where taxable; situs.

(See previous Annual Digests.)

III. Assessment of property; enforcement.

A. IN GENERAL; LEVY AND APPORTIONMENT.

(§ III A—105)—OWNER AND LESSEE—SEIZURE OF CROP—POWER OF MUNICIPAL COUNCIL.

Where the owner of certain land has leased and sublet other land, under a crop payment lease, and his share of the crop has been seized and the proceeds applied in payment of the taxes due on the leased property, the council of the municipality has power, under the Rural Municipality Act, R.S.S. 1909, ch. 87, by agreement, to apply the proceeds of such seizure in payment of the lessee's taxes due on other land. Such power may be exercised by resolution.

Kaufman v. Rur. Mun. of Baildon (Sask.), 43 D.L.R. 487, [1918] 3 W.W.R. 611.

B. ASSESSMENT; VALUATION.

(§ III B—119)—NOTICE OF ASSESSMENT—SEVERAL OWNERS—IRREGULARITIES.

The provisions in the Town Act, ch. 2, 1911-12, as to the form of the assessment roll and the entry of the date of the sending of assessment and tax notices are directory only. [Clive School District v. Northern Crown Bank, 12 A.L.R. 344, 34 D.L.R. 16, followed.] The assessment on assessment and tax rolls

of certain lots upon which a hotel was built to "Queen's Hotel, Vegreville, Alex. Dow, F. Geiler, Ed. C. Cyre," the three persons named being jointly interested as owners in the lots and the hotel, and the last named being manager thereof, and the sending of the assessment and tax notices to Cyre only, by whom the taxes were paid for a number of years, held, per Harvey, C.J., Stuart and Beck, JJ., Simmons, J., dissenting, to be a proper assessment of the property and a proper giving of the notices.

Hagman v. Merchants Bank, 13 A.L.R. 293, [1918] 2 W.W.R. 377.

FAILURE TO GIVE NOTICE — CURATIVE STATUTE.

The curative provisions of the Town Act, ch. 2, 1911-12, are not intended to condone a total neglect of the ordinary duties of a municipality in relation to assessments and the collection of taxes; sec. 317 (which provides that "no defect, error or omission in the form or substance of the notice or statement required by secs. 301 and 302 hereof, or in the service, transmission or receipt thereof, shall invalidate any subsequent proceedings for the recovery of taxes") involves or assumes the existence in some form or other of at least a notice and statement issued and directed to the taxable person.

Merchants Bank v. Guyler (Alta.), [1918] 1 W.W.R. 257.

DESCRIPTION OF LANDS—SUFFICIENCY—NOTICE—MUNICIPAL ORDINANCE.

The conduct of the defendant's officers held to have constituted an admission, which it was not open to it to dispute, that it was the body designated by the name "Townsite Trustee," on the assessment roll of the plaintiff roll of the plaintiff city. [Hagman v. Merchants Bank of Canada (1918), 13 A.L.R. 293, applied.] Any description on an assessment roll which will enable the owner of lands to identify those for which he is assessed is a sufficient description. [City of Toronto v. Russel, [1908] A.C. 493, and Cartwright v. City of Toronto, 13 D.L.R. 604, followed]. A statute providing that the council of each municipality shall appoint an assessment committee consisting of "the mayor or reeve, secretary-treasurer and assessor or any two others with the assessor," is complied with by the appointment of the mayor, an alderman and the assessor, although the assessor occupies the dual position of secretary-treasurer and assessor, and in the resolution appointing the committee he is styled secretary-treasurer instead of assessor. There is nothing in the Municipal Ordinance to prevent one person holding the dual position of secretary-treasurer and assessor. Quære, whether the Towns Act, ch. 2, 1911-12, applies to the city of Wetaskiwin. The grounds for the imposition of a rate of taxation in excess of that authorized by the defendant city's charter, except in the case where provision is being made for the payment of public works, are not required to appear on the assessment roll. The provision in sec. 146 of the Municipal Ordinance that notices demanding payment of taxes shall be mailed on or before October 1, is merely directory.

City of Wetaskiwin v. C. & E. Townsites (Alta.), [1918] 3 W.W.R. 145. [Affirmed on appeal.]

(§ III B—125)—INCREMENT TAX—VALUE OF LAND.

The increased value of land under the Unearned Increment Tax Act (Alta. 1913, 2nd sess, ch. 10) is to be computed as of the time of registering the transfer.

Bredin v. Canadian Northern Town Properties, 39 D.L.R. 20, 13 A.L.R. 225, [1918] 1 W.W.R. 542.

ACTUAL VALUE.

The Manitoba Assessment Act, R.S.M. (1913), ch. 34, sec. 29, does not authorise the assessment of property at more than its actual value.

Roman Catholic Arch. Corp. of St. Boniface v. Town of Transcona, 39 D.L.R. 148, 56 Can. S.C.R. 56, [1918] 1 W.W.R. 347.

"ACTUAL VALUE" — HOTEL PROPERTY — PROHIBITION ACT.

In assessing property the assessor should determine the "actual value" thereof within the meaning of the Municipal Act, R.S.B.C. 1911, ch. 170, as amended by sec. 30, ch. 46, 1915, by taking the viewpoint of a solvent owner not anxious to sell, but yet not holding for a fictitious or merely speculative rise in price, and by considering how such value is affected by existing conditions. [Re Charleson Assessment, 21 B.C.R. 281, at pp. 285 and 296, 22 D.L.R. 240, applied; Re Municipal Clauses Act and Dunsmuir, 8 B.C.R. 361, distinguished.] In assessing a hotel property the effect of the British Columbia Prohibition Act upon the former value thereof should, therefore, be taken into consideration.

Re Municipal Act; Gates' case (B.C.), [1918] 2 W.W.R. 930.

D. REVIEW; CORRECTION; EQUALIZATION; APPEAL.

(§ III D—135)—ASSESSMENT—POWER TO REVISE.

Rur. Mun. of Sherwood v. Wilson, 39 D.L.R. 761, 55 Can. S.C.R. 617, affirming 31 D.L.R. 795, 30 D.L.R. 539.

ACTUAL OR CASH VALUE—ILLEGALITY OF ASSESSMENT — FAILURE TO APPEAL — TOWN ACT.

The fact that an assessor in making an assessment disregards the principal prescribed by the Town Act, ch. 2, 1911-12, that land should be appraised at its fair, actual or cash value and places a higher value thereon, does not render the assessment illegal so as to deprive the court of revision and the district court Judge, on appeal therefrom, of jurisdiction. [Toronto Railway v. Toronto Corporation, [1904] A.C. 800, 73 L.J.P.C. 120, distinguished.] Where

in such a case the person assessed appeals from the assessment to the court of revision, which affirms the assessment, but he does not exercise the right given by the Act to appeal further to the district court Judge, the matter is res judicata, and such person cannot raise the impropriety of the method of assessment as a defence to an action for taxes. (Per Anglin, J., Davies, C.J., concurring.)

Town of Macleod v. Campbell (Can.), [1918] 3 W.W.R. 769, 44 D.L.R. 210, reversing 41 D.L.R. 357, 13 A.L.R. 487, [1918] 2 W.W.R. 718.

"ACTUAL VALUE"—REVIEW ON APPEAL.

The "actual value" at which the assessors of the city of Montreal are bound to assess real properties must be the selling value, that is, the price which the owner might obtain for his property from a purchaser who, without being bound to pay, might want to acquire it. The assessors should only take count of the value of property at the moment of making the roll; they cannot take into consideration the expectation of public works, such as the opening of projected streets, the construction of sewers and other works of the same nature. The principle that a court of appeal should only intervene with much circumspection in the exercise of the functions of municipal assessors has application only in a case where the law gives to these officials a purely discretionary power, and not when they violate a principle or positive rule of law.

Lacroix v. City of Montreal, 54 Que. S.C. 130.

MUNICIPAL VALUATION—REVIEW BY COURT.

Courts ought not to substitute their opinion for that of valuators and municipal councils, whose examination is requisite for the validity of the valuation rolls.

Fortin v. La Corporation de la Paroisse de Contrecoeur, 24 Rev. de Jur. 537.

(§ III D—137)—COURT OF REVISION—POWER TO REMIT.

Neither the Court of Revision of a municipality nor the County Court Judge has jurisdiction under the Assessment Act (R.S.O. 1914, ch. 195, sec. 118) to remit or reduce taxes which have been paid; the authority to remit is confined to taxes due.

Taylor v. City of Guelph, 39 D.L.R. 416, 41 O.L.R. 33.

ASSESSMENT ACT (R.S.N.S. 1900, CH. 73)—OBJECTIONS TO VALUATION—STATEMENT UNDER OATH — ASSESSORS — APPEAL — ASSESSMENT ACT COURT — TAXING ACT —CONSTRUCTION — NO APPEAL TO COUNTY COURT—PROCEDURE.

Nova Scotia Steel & Coal Co. v. Sydney Mines (N.S.), 41 D.L.R. 744.

E. PERSONAL OBLIGATION; ACTION FOR COLLECTION.

(§ III E—140)—ACTION UNDER MUNICIPAL ACT—APPEAL—REVISION.

If an assessment of land is illegal the person assessed is not compelled to resort to the remedy of an appeal to the Courts of Revision, but may resist an action under the Municipal Act (B.C. 1914, ch. 52, sec. 275) to recover the taxes. A municipality has no power to assess lands situate in another municipality.

North Cowichan v. Hawthornthwaite, 42 D.L.R. 207, 24 B.C.R. 571, [1918] 3 W.W.R. 574.

SEIZURE FOR TAXES — "OCCUPANT" — NOTICE—"AT LEAST TEN DAYS"—DAMAGES.

Under sec. 308 (1) of R.S.S. 1909, ch. 87, authorizing seizure for arrears of taxes, the seizure of "the property of or in possession of any other occupant of the premises" can be made only when the property is found upon the land in respect of which the taxes are due, and such property is liable only for the taxes due upon that particular parcel of land. In an action for damages for a wrongful seizure of property for arrears of taxes the onus is on the defendant to show the legality of the seizure. [McCutcheon v. Minitonas, 2 D.L.R. 117, followed.] The plaintiff held not to have been an "occupant" within the meaning of sec. 2 (10) of the Rural Municipality Act, R.S.S. 1909, ch. 87, of a certain quarter-section of land, although his cattle were found thereon. The "at least ten days" public notice prescribed by sec. 308 (2) of the Rural Municipality Act, R.S.S. 1909, ch. 87, of an intended sale of property for taxes means ten clear days. [Canadian Canning Co. v. Fagan, 12 B.C.R. 23, 3 W.L.R. 38, followed.] C. 5, 2 William & Mary (an Act for enabling the sale of goods distrained for rent in case the rent be not paid in a reasonable time) does not apply to the seizure of goods for arrears of taxes.

Purdy v. Rur. Mun. of Langenburg (Sask.), [1918] 3 W.W.R. 161.

F. SALE; DEED; RIGHTS OF PURCHASERS.

(§ III F—146)—CONFIRMATION OF SALE—LAND TITLES—ORDER—INVALIDITY.

Sec. 2 of ch. 49, R.S.S. 1909 provides that no application for an order for confirmation shall be heard until all persons appearing by the records of the proper Land Titles Office to have any interest in the said land have received notice of such application; an order made in the face of this statutory prohibition is made without jurisdiction and is void, The questions involved, not having been determined in a regular procedure, the doctrine of res judicata has no application.

Wallbridge v. Steenson, and Waseca School Dist. Board of Trustees, 41 D.L.R. 330, 11 S.L.R. 224, [1918] 2 W.W.R. 801.

ILLEGAL ASSESSMENT — CONFIRMATION — SETTING ASIDE.

The assessment under the Local Improvement Act, ch. 11, 1907, of contiguous lots separately in each block is illegal. [Rural Municipality of Bow Valley v. McLean, 26 D.L.R. 716, followed.] Semble, the confirmation of a tax-enforcement return by a

Judge of a district court must be made by him as an adjudication of such court, or a Judge thereof, and not as persona designata. The confirmation of tax-enforcement return set aside and the title issued thereon directed to be cancelled.

Sutherland v. Rur. Mun. of Spruce Grove (Alta.), [1918] 3 W.W.R. 152, varied in 43 D.L.R. 280.

MUNICIPAL ACT—RIGHTS OF PURCHASER—LAND—FIXTURES—EQUITABLE WASTE.

Where land is sold under sec. 250 of the Municipal Act, ch. 52, 1914 (B.C.), for arrears of taxes, improvements thereon become the property of the purchaser, although improvements are not assessed. A purchaser at a tax sale under the Municipal Act obtains an inchoate right in, or title to, the property which may ripen into a complete title upon failure of the owner to redeem, and while the purchaser cannot now enter into possession during the redemption year, equity will apply to the person in possession the principles of equitable waste, so as to prevent him from acting in respect of the property to the injury of the tax sale purchaser, and therefore the purchaser may obtain an order restraining the owner from removing from, or disposing of, fixtures in a building on the land sold and for the return of those removed. [Vane v. Barnard, 2 Vern 738; Turner v. Wright, 2 De G. F. & J. 234, applied.]

City of New Westminster v. Kennedy (B.C.), [1918] 1 W.W.R. 489.

SALE OF LAND FOR ARREARS OF TAXES—ASSESSMENT ACT, R.S.O. 1914, CH. 195, SEC. 22—OWNERSHIP OF LAND—ILLEGAL ASSESSMENT—DUTY OF ASSESSOR—INQUIRY—KNOWLEDGE OF CITY COUNCIL—NECESSITY FOR SUBSTANTIAL COMPLIANCE WITH STATUTORY PROVISIONS—SALE SET ASIDE.

Heighington v. City of Toronto, 15 O.W.N. 76.

TAX SALE — ARREARS OF TAXES ACT — RETURN — TIME — REGISTRATION — TITLE.

Re Land Titles Act (Sask.), [1918] 3 W.W.R. 343.

MUNICIPAL TAX SALES.

The city of Montreal has the right, under its charter, to announce anew the sale of an immovable for municipal taxes, according to C.C.P. art. 733, after an opposition has been decided subsequently to the date fixed for the sale in the first notice.

La Cité de Montréal v. Tritt, 24 Rev. Leg. 167.

MUNICIPAL TAX SALES — COLLOCATION — OWNERSHIP.

One who purchases property sold for municipal taxes, which is not redeemed within the two years following, has a right to be collocated in the stead of the original owner, if the property is sold by the sheriff when in possession of such purchaser, even if he had only registered his title more than six months after the expiry of the two years.

Noel v. Roy, 24 Rev. Leg. 507.

MUNICIPAL TAX SALES—ACTION TO SET ASIDE—PARTIES—PURCHASER.

Although sec. 1019, old Mun. Code (Que.) reproduced in sec. 751, new Code, declares that the action to set aside the sale of immovables sold for municipal taxes can only be taken against a municipal corporation whose officers are in default, the real owner of an immovable property sold "super non domino" has, nevertheless, the right to summon the purchaser, and to add petitory conclusions to his action to set the sale aside.

Gale v. Lacroix, 53 Que. S.C. 292.

IV. Lien.

(§ IV—175)—ENFORCEMENT OF LIEN — SCHOOL TAXES.

The special lien for arrears of taxes declared by sec. 15 of the School Assessment Ordinance, C.O., ch. 105, is not enforceable by action. [Sturgeon Falls v. Imperial Land Co., 7 D.L.R. 352, 31 O.L.R. 62, distinguished; Town of Athabasca v. Shaw, [1917. 3 W.W.R. 505, followed; L.I. District 453 v] North Saskatchewan Land Co., [1917] 2 W.W.R. 138, not followed.]

Board of Trustees for Richmond School District v. Garbutt (Alta.), [1918] 2 W.W.R. 926.

V. Succession duties.

A. In general.

(§ V A—180)—RATE OF DUTY—MIXED ESTATE—MIXED FUND—WILL.

The will of Lord Strathcona held not to create, or disclose an intention to create, out of the real and personal estate a mixed fund to be applied in the payment of legacies, so as to bring it within the rule in Roberts v. Walker, 1 Russ. & M. 752. [The will in Allan v. Gott, L.R. 7 Ch. 439, distinguished.] The mere fact that executors are given wide discretionary powers in dealing with the whole estate to dispose of the real estate of the testator and in reinvesting the proceeds thereof does not ipso facto put the case on all fours with Allan v. Gott, supra. The contention of the Provincial Treasurer of Manitoba that, for the purpose of arriving at the amount of succession duties payable by the estate of Lord Strathcona, legacies to all beneficiaries should be deemed to be payable pro rata out of the whole estate, and the real estate in Manitoba should bear its pro rata share, not upheld, the Court holding that the will did not create out of the real and personal estate a mixed fund for the payment of legacies.

Re Lord Strathcona's Estate, [1918] 2 W.W.R. 499, 28 Man. L.R. 579.

"FAIR MARKET VALUE."

For the purpose of fixing the "fair market value," within the meaning of the Succession Duties Act, ch. 187, R.S.M. 1913, of certain vacant and unimproved property, part of which was sub-divided, and for all of which

there was no market, held, per Perdue and Fullerton, JJ.A., that the values given by the executors in the inventory filed by them should be accepted. Cameron, J.A., fixed the value with regard to the present value of the possibilities of sub-division and sale at some not unreasonably distant date, and, in the absence of a present market, taking as a test a hypothetical sale such as that referred to by Idington, J., in Pearce v. Calgary, 9 W.W.R. 668, to some person willing to take advantage as an investment of the existing shrinkage in values. [Re Marshall, 20 O.L.R. 116; Pearce v. Calgary, supra; Grierson v. Edmonton, [1917] 2 W.W.R. 1142; Fraser v. Fraserville, 34 D.L.R. 211, referred to.]

Re Nairn Estate, [1918] 2 W.W.R. 278, 28 Man. L.R. 546.

C. Persons, property, transfers and interests subject to tax.

(§ V C—190)—Mortgages—Situs.

Mortgages under the Alberta Land Titles Act to a person resident out of Alberta on land situated therein are property situate within the province, and upon the death of the mortgagee are subject to duty under the Succession Duties Act (Alberta); the duplicate retained by the registrar, under the Land Titles Act (Alberta), is the real security, not the duplicate retained by the mortgagee. [Payne v. The King, [1902] A.C. 552, followed.]

Toronto General Trusts Co. v. The King, 39 D.L.R. 380, 56 Can. S.C.R. 26, affirming 32 D.L.R. 524, 11 A.L.R. 138.

D. Assessment and collection.

(§ V D—205)—Arrears—Adjudication of —Notice—Copy—Mailing.

An adjudication as to arrears of taxes and confirmation of tax sales under sec. 316 of the Rural Municipalities Act (Alta. stats. 1911-12, ch. 3), which bears no date on its face, has no date such as the Act contemplates and is not a foundation for the subsequent proceedings prescribed by the Act to enable the municipality to become the registered owner. Sec. 316 (c) of the Act requiring a copy of the adjudication to be mailed . . . . is not complied with by mailing a notice of such adjudication. [Mun. of Bow Valley v. McLean, 26 D.L.R. 716, distinguished.]

Sutherland v. Rur. Mun. of Spruce Grove (Alta.), 43 D.L.R. 280, varying, [1918] 3 W.W.R. 152.

Time—Crown's lien.

The phrase "unless otherwise provided for" in sec. 20 of the Succession Duty Act, ch. 217, R.S.B.C. 1911, refers to the succeeding phrase "shall be due and payable at the death of the deceased"; it, therefore, deals with the time of payment, not with the method thereof, and the lien given the Crown by said section is not confined to the period previous to the issue of letters probate.

Re Crawford Estate (B.C.), [1918] 1 W.W.R. 267.

VI. Income tax.

(§ VI—220)—Petition to reduce—Domicile.

A petition presented to the County Court for a reduction of taxes on the ground that the petitioner is a non-resident of the county is a sufficient compliance with sec. 77 of 3 Geo. V., ch. 21, N.B., to give the Judge jurisdiction if the facts stated in the petition exclude the possibility of the petitioner being a resident or domiciled in such county.

Re McLean; Ex parte the Assessors of Parish of Rothesay (N.B.), 43 D.L.R. 316.

TELEGRAPHS.

Telegraph tolls—Development stage of business.

The Board has recognized that while in general telegraph tolls must be looked at from the standpoint of a general scheme, yet where business is in a development stage the isolation of the telegraph line and the particular facts of the particular section should be considered. [In re Telegraph Tolls, 20 Can. Ry. Cas. 1, followed.]

Town of The Pas v. G.N.W. Telegraph Co., 22 Can. Ry. Cas. 402.

Wires along highways—Underground—Jurisdiction of board—Railway Act.

Under sec. 247 (g) the Board only has jurisdiction to direct that wires be placed underground and to abrogate the right of a public utility company to carry its wires along highways on poles. The Board cannot order that poles and wires be moved from one street to another or that wires be placed in cables or upon a designated line of poles. Such a company, however, has at all times the right to remove its pole line from a street and an order from the Board to place its wires underground does not prevent it from exercising such right.

City of Chatham v. Great North Western Telegraph and Bell Telephone Cos., 21 Can. Ry. Cas. 183.

TELEPHONES.

(§ I—8)—Telephone company—Powers of —Right to maintain poles in streets —Charter preceding incorporation of town—Rights under charter—Agreement with corporation—Municipal Act 1903, secs. 331, 559—Municipal Franchises Act R.S.O. 1914, ch. 197.

Temiskaming Telephone Co. v. Town of Cobalt, 43 D.L.R. 724, 42 O.L.R. 385, reversed in 15 O.W.N. 242.

Jurisdiction of railway board—Service.

2 & 3 Edw. VII., ch. 41, sec. 2, limits the Board's jurisdiction to direct the installation of a telephone service but gives the Board no power in regard to facilities such as it has in the case of railway companies. [Tinkess v. Bell Telephone Co., 20 Can. Ry. Cas. 249, followed.]

North Lancaster Exchange v. Bell Telephone Co., 21 Can. Ry. Cas. 220.

JURISDICTION—STATIONS—RAILWAY ACT.

The Board has no jurisdiction under sec. 245 of the Railway Act to compel a railway company to continue the maintenance of telephonic connection and communication between its stations and the telephone system already installed, of the applicants. The Board has no jurisdiction under secs. 284 and 317 of the Railway Act to prevent the removal (at the instance of the municipalities within whose limits railway stations are situate) of telephones installed at such stations. The "facilities clause," sec. 284 of the Railway Act, refers to physical transportation and physical accommodation on the railway. Telephonic communication with a railway station to be acquainted with the movement of the passenger or freight trains is not a facility which railway companies are required to furnish to the public under sec. 284. [Towns of Port Arthur and Fort William v. Bell Telephone and Canadian Pacific Ry. Cos., 4 Can. Ry. Cas. 279, at p. 284; People's and Caledon Telephone Cos. v. Grand Trunk and Canadian Pacific Ry. Cos., 9 Can. Ry. Cas. 161, at p. 162, referred to.]

Province of Manitoba v. C.P.R. Co., 21 Can. Ry. Cas. 445.

JURISDICTION — TOLLS — CONNECTIONS — LONG DISTANCE—LOCAL.

The Board has jurisdiction to order connection and fix tolls for long distance business but it has none in the case of connection for local business. [Bell Telephone Co. v. Falkirk Telephone Co., 20 Can. Ry. Cas. 256, followed.] In the case of connecting telephone companies it is the duty of both companies to collect the full amount for long distance tolls, and the company should not absorb its share of the through long distance toll. [Ernesttown Rural Telephone Co. v. Bell Telephone Co., 18 Can. Ry. Cas. 325, followed.]

Joliette Telephone Co. v. Bell Telephone Co., 21 Can. Ry. Cas. 443.

JURISDICTION — CONDITIONS — COMPENSATION—RAILWAY ACT.

The Board is given no jurisdiction under sec. 47 to make the payment of compensation a term of an order approving the location and construction of a telephone line upon a public highway or to impose any condition for which a municipality may contend in bargaining with a telephone company as a term or condition of such order. [Grand Trunk Pacific Ry. Co. v. Fort William Landowners and Fort William Land Investment Co., et al, [1912] A.C. 224, at p. 229, 13 Can. Ry. Cas. 187, followed.] It is not the function of the Board to decide upon the validity of Dominion or provincial legislation. Under its charter, 43 Vict., ch. 47, sec. 3, and the interpretation clause of the Railway Act, sec. 2 (11), the Bell Telephone Co. has power to carry its lines along a bridge on which there is a public right of travelling. [Auger & Sons and D'Auteuil Lumber Co. v. Grand Trunk and Canadian Pacific Ry. Cos., 19 Can. Ry. Cas. 401, followed.]

Bell Telephone Co. v. City of Ottawa and County of Carleton, 22 Can. Ry. Cas. 421.

JURISDICTION.

In approving the route on a highway of the Bell Telephone Company the jurisdiction of the Board is confined to fixing such terms, condition or limitations as refer to the lines, wires or poles within the municipality. The Board has no jurisdiction to require, as a condition, the payment of any money or the granting of free telephones to the municipality.

City of Windsor v. Bell Telephone Co., 22 Can. Ry. Cas. 416.

TEMPERANCE ACT.

See Intoxicating Liquors.

TENANTS.

See Landlord and Tenant.

TENANTS IN COMMON.

See Co-tenancy.

TENDER.

Annotation.

Requisites and sufficiency of tender: 1 D.L.R. 666.

(§ I—2)—INSURANCE—TENDER OF PREMIUM —NOTICE—REGISTERED LETTER.

Notice of cancellation of a policy of insurance may be given by registered letter addressed to the insured as required by condition 15 of the Ontario Insurance Act (R.S.O. 1914, ch. 183, sec. 4) and a sufficient tender to comply with condition 11 is made if the money for the unearned premium is enclosed with the notice so properly addressed and registered. The notice, however, is effective only from the time it is actually received by the insured.

London and Lancashire Fire Ins. Co. v. Veltre, 42 D.L.R. 79, 56 Can. S.C.R. 588, affirming 39 D.L.R. 221, 40 O.L.R. 619.

TESTAMENTARY CAPACITY.

See Wills.

THEATRES.

THEATRES AND CINEMATOGRAPHS ACT—REGULATIONS AS TO PLACING ADVERTISING MATTER IN FRONT OF A THEATRE—"IN THE NATURE OF POSTERS"—CONVICTION FOR BREACH OF REGULATION—CONSTRUCTION OF REGULATION.

Rex v. Minhinnick, 13 O.W.N. 440.

THEFT.

(§ I—1)—MORTGAGE—DEATH OF MORTGAGOR—SALE OF CROPS BY WIDOW.

A widow who continues to live on land owned and mortgaged by her husband before his death, where letters of administration have not been applied for or granted, is a trespasser; her position is not affected by the Devolution of Estates Act, and crops grown by her on the said land do not belong to the

estate of the deceased and are not distrainable under either the attornment or the license clause of the mortgage.

The King v. Tschetter, 39 D.L.R. 688, 11 S.L.R. 116, 29 Can. Cr. Cas. 179, [1918] 1 W.W.R. 934.

(§ I—3a)—Mortgage — Bailee — Sale of goods.

A mortgagor who gives an undertaking to hold goods seized under a mortgagee's warrant of distress, as agent and bailee, but who subsequently sells the goods and gives no account of the proceeds, cannot be convicted of theft under sec. 355 of the Criminal Code.

Rex v. Kimbrough, 41 D.L.R. 40, 13 A.L.R. 412, 30 Can. Cr. Cas. 56, [1918] 2 W.W.R. 892.

(§ I—15)—Illegal possession of gold or silver ores—Presumptions.

A person found in possession of silver ore under reasonable suspicion of such possession being illegal, within the meaning of Code secs. 424 and 424A, has thrown upon him the onus of satisfactorily accounting at the trial for such possession when charged under Code sec. 424A, and it is not necessary that before arrest or before the prosecution was begun he should have been asked by a police officer to explain his possession of the ore.

Rex v. Karp, 30 Can. Cr. Cas. 115, 41 O.L.R. 540.

(§ I—40)—On high seas—Procedure.

Proceedings for the trial of a foreign subject charged with theft on a British ship, committed on the high seas, should not be taken under sec. 591 of the Criminal Code but under sec. 686 of the Merchants Shipping Act, 1894 (Imp.); the consent of the Governor-General is not required before instituting proceedings. [The King v. Heckman, 5 Can. Cr. Cas. 242, followed.]

The King v. Neilson, 40 D.L.R. 120, 30 Can. Cr. Cas. 1, 52 N.S.R. 42.

THIRD PARTY PROCEDURE.

See Parties.

TIMBER.

See Contracts; Liens.

(§ I—10)—Jurisdiction of exchequer court—Compensation—Public grant—Right of way — License — Assignment.

Where a province has made a free grant of a right of way on its lands to a railway of the Dominion Government, it cannot subsequently, in the absence of Dominion legislation authorizing it, grant or assign to a third person any rights to the timber on such right of way. 2. The Exchequer Court has jurisdiction to entertain a claim for the cutting and removing of timber by officers and servants of the Crown while engaged in the construction of a Crown railway. 3. A licensee to cut timber has a sufficient interest in the limits covered by the license to entitle him to claim compensation for the taking of the timber by the Crown. The measure of damages is the value of the timber as a whole as it stood at the time of the taking.

Malone v. The King, 42 D.L.R. 520, 18 Can. Ex. 1.

TIME.

For taking appeal, see Appeal.

As essence of contract, see Contracts; Vendor and Purchaser.

For filing mechanics' liens, see Mechanics' Liens.

For commencing actions, see Limitation of Actions.

TOLLS.

See Carriers; Telegraphs; Telephones.

TORRENS SYSTEM.

See Land Titles.

TORTS.

See Damages; Negligence; Nuisance; Railways; Street Railways; Carriers; Master and Servant; Municipal Corporations; Highways; Waters; Crown.

TOWNS.

See Municipal Corporations.

TRADEMARK.

See also Trade-name; Patents.

Annotations.

Trade-name; user by another in a non-competitive line: 2 D.L.R. 380.

Descriptive and distinctive words, secondary meaning, expunction or variation of registered trade-mark: 27 D.L.R. 471.

"Passing off," abandonment of trade-mark: 31 D.L.R. 602.

Registrability of surname as trademark: 35 D.L.R. 519.

Distinction between trademark and trade-name and the rights growing out thereof: 37 D.L.R. 234.

(§ IV—21)—Infringement—Using containers—Labels—Obliteration.

There is no infringement of the Trademark and Design Act (R.S.C., ch. 71, sec. 19) if a tank, not itself protected by patent but used to store a patented product, is refilled by another manufacturer who obliterates the trademark on the tank by pasting a label over it showing that the tank has been refilled.

Prest-o-Lite Co. v. People's Gas Supply Co., 38 D.L.R. 379, 55 Can. S.C.R. 440, affirming 16 Can. Ex. 386.

Formula — Facsimile — Injunction — Damages.

The fact that the formula of a substance which has been sold under the facsimile signature of the maker is transferred to another manufacturer who acquires the right to sell it does not entitle the latter to use the signature where the right to use it has not been expressly transferred to him; and the person entitled to the use of the name may

obtain an injunction restraining its use by the other, and also restraining the use by such other of a false statement that the substance sold by the latter is made from the original formula, even though the first maker no longer sells the substance directly to the public but manufactures it for a selling company of which he is a member. [Warwick Tyre Co. v. New Motor & General Rubber Co., [1910] 1 Ch. 248, followed.] Under such circumstances, however, he is entitled to nominal damages only.

Mickelson v. Kill-Em-Quick Co. (Man.), [1918] 1 W.W.R. 781.

TRADE-NAME.

Annotations.

Unfair competition; using another's trade-mark or trade-name; non-competitive lines of trade: 2 D.L.R. 380.

Passing off: 31 D.L.R. 602.

Distinction between trade-mark and trade-name, and the rights growing out thereof: 37 D.L.R. 234.

(§ I—9)—INFRINGEMENT — "PASSING-OFF" —EVIDENCE — DECEPTION—REASONABLE POSSIBILITY OF DECEPTION.

Rubberset Co. v. Boeckh Brothers Co., 15 O.W.N. 189.

DECEPTION—USE OF SIMILAR NAME AND LABEL—SALE OF GOODS—LIKELIHOOD OF PURCHASERS BEING DECEIVED—EVIDENCE—SUSPICIOUS CIRCUMSTANCES—ACTION TO RESTRAIN USE OF NAME AND LABEL—DISMISSAL—COSTS.

Canadian H. W. Gossard Co. v. Dominion Corset Co., 14 O.W.N. 164, affirmed in 15 O.W.N. 103.

TRADING WITH ENEMY.

See Aliens.

Annotation.

Status of alien enemies during war: 23 D.L.R. 375, 22 D.L.R. 865.

TRAIN SERVICE.

See Carriers; Railways.

TRANSIENT TRADERS.

See Pedlars.

TRANSPORTATION.

See Railways; Carriers; Shipping; Railway Board.

TRESPASS.

Liability for injury to trespassers, see Negligence.

Annotations.

Obligation of owner or occupier of land to licensees and trespassers: 1 D.L.R. 240.

Unpatented land; effect of priority of possessory acts under colour of title: 1 D.L.R. 28.

TRIAL.

I. CONDUCT AND DISPOSAL.
- A. In general.
- B. Election between counts.
- C. Reception of evidence.
- D. Statements and arguments of counsel.
- E. Withdrawal of juror.
- F. Objections and exceptions.
- G. Answering inquiry by jury; reading testimony to.
- H. Remarks of Court.

II. SUBMITTING CASE TO JURY.
- A. In general.
- B. Sufficiency of evidence to go to jury.
- C. Questions of law and fact.
- D. Taking case from jury.
- E. Special interrogatories.

III. INSTRUCTIONS.
- A. In general; form; time.
- B. Requests and answers generally.
- C. On what matters necessary or proper.
- D. On evidence and facts.
- E. Correctness of instruction.

IV. FINDINGS BY THE COURT.

V. VERDICT OR FINDINGS OF JURY.
- A. In general.
- B. Retirement; conduct of jury; coercion; poll.
- C. Sufficiency and correctness.
- D. Amendment or correction.
- E. Remittitur; setting aside.

Postponement of, see Continuance and Adjournment; Stay of Proceedings.

Right to trial by jury, see Jury.

Grounds for new trial, see New Trial.

Place of trial, see Venue; Courts.

Annotations.

Preliminary questions; actions for malicious prosecution: 14 D.L.R. 817.

Publicity of the Courts; hearing in camera: 16 D.L.R. 769.

Sufficiency of evidence of negligence to go to jury: 39 D.L.R. 615.

I. Conduct and disposal.

A. IN GENERAL.

(§ I A—1)—ADJOURNMENT—NOTICE OF TRIAL — SITTINGS — JUDGMENT — IRREGULARITY.

Where an action comes on for trial at a sittings, and the trial is at that sittings peremptorily adjourned till a later sittings, a new notice of trial for the later sittings is necessary: rule 252. A countermand of a notice of trial is not regular. [Friendly v. Carter (1881), 9 P.R. 41, approved.] Where the trial had been adjourned to the June sittings, and the plaintiffs (by mistake) gave notice of trial for the October sittings, and the action was entered for trial at the October sittings, but the plaintiffs, without formally countermanding their notice for the later sittings—and without any motion being made by either party—gave notice of trial for the June sittings, and caused the entry for trial to be correspondingly changed:—Held, that the defendant had accepted the plaintiff's notice of trial for the October sittings, and, without an order setting it aside, the plaintiffs were bound by it; and a judgment for the plaintiffs pronounced

at the June sittings, the defendant not appearing, was set aside.

Malden Public School Board v. Sellers, 42 O.L.R. 14.

NOTICE OF TRIAL—REGULARITY—RULES 173 (1), 248—COMPUTATION OF PERIOD OF 10 DAYS—PRACTICE.

Mayfair Investments v. Somers, 15 O.W.N 95.

CONVENIENCE OF TRIAL OF TWO ACTIONS AT SAME SITTINGS—REMOVAL OF COUNTY COURT ACTION INTO SUPREME COURT OF ONTARIO—COUNTY COURTS ACT, SEC. 29—TERMS—SECURITY FOR COSTS—DIRECTIONS AS TO TRIAL.

Huff v. Burton, 14 O.W.N. 181.

H. REMARKS OF COURT.

(§ I H—39) — JUDGE EXPRESSING OWN OPINION.

The trial Judge, in summing up in a criminal case, may express his own opinion upon the facts. and this will not be a ground for a new trial if he made it clear to the jury that they were the judges of the facts and were to exercise their own judgment without being bound to accept his view.

Rex v. Moke, 38 D.L.R. 441 (annotated), 12 A.L.R. 18, 28 Can. Cr. Cas. 296.

II. Submitting case to jury.

A. IN GENERAL.

(§ II A—40)—REFUSING TRIAL BY JURY—DISCRETION—APPEAL.

A Court of Appeal will not interfere with an order of a Judge, refusing a trial with a jury, where he has exercised his discretion after proper consideration of the case and has not proceeded upon any wrong principle.

Cristall v. McKernan, 40 D.L.R. 82, 13 A.L.R. 317, [1918] 2 W.W.R. 519.

B. SUFFICIENCY OF EVIDENCE TO GO TO JURY.

(§ II B—45)—NEGLIGENCE.

Absence of evidence from which a jury can reasonably find that there was negligence on the part of the defendant which caused the accident justifies the trial Judge in withdrawing the case from the jury and dismissing the action.

Steele v. Cape Breton Electric Co., 39 D.L.R. 609 (annotated), 52 N.S.R. 61.

(§ II B—46)—NEGLIGENCE—FAMILIES COMPENSATION ACT.

If in an action under the Families Compensation Act (B.C.), the finding of the jury is that there was negligence, and if upon the facts there was evidence sufficient to admit of the question being passed upon by it, the verdict will not be disturbed unless some error in law has taken place.

Evans v. Corp. of Richmond (B.C.), 43 D.L.R. 214, [1918] 3 W.W.R. 487.

III. Instructions.

D. ON EVIDENCE AND FACTS.

(§ III D—229)—READING CHARGE TO JURY.

In determining whether the instruction to the jury was a proper one or not, the Appellate Court is to look at the charge as a whole; a new trial will not be granted, even in a capital case, because of minor inaccuracies in the charge if the inaccuracies cannot have misled the jury and the defence was fairly put before them.

Rex v. Hogue, 39 D.L.R. 99, 39 O.L.R. 427, 28 Can. Cr. Cas. 419.

E. CORRECTNESS OF INSTRUCTION.

(§ III E—237)—NEGLIGENCE—DEATH—DAMAGES — EVIDENCE — DEATH OF JUDGE.

It is error in law for a Judge, in an action by a husband and his children for the accidental death of his wife and their mother, to advise the jury that they could not take into consideration the funeral expenses incurred by them. The loss of a wife and mother is to the husband and children a pecuniary loss, which a jury is bound to admit according to evidence adduced before them. Where the Judge comments upon a fact as proved, when it is not, thereby influencing improperly the mind of the jury, it is ground for a new trial. If the Judge died before signing his charge to the jury, the Court of Review may, under art. 1208, C.P., order the charge to form part of the record.

Montreal Tramways Co. v. Rothschild, 27 Que. K.B. 350.

(§ III E—260)—CRIMINAL CASE—JOINT TRIAL—ADMISSIONS.

Where two persons are being jointly tried, and particularly where an order for a separate trial has been refused, and proof is offered of statements made by one of the accused not in the presence of the other and not admissible as against the latter, but likely to be considered by the jury as evidence against both unless a proper direction is given to them, it is error in law for the trial Judge to omit to give an instruction to the jury that the statement so sworn to have been made by the one accused is evidence only against him and not against his co-defendant.

Rex v. Murray and Mahoney, 38 D.L.R. 395, 11 A.L.R. 502, 28 Can. Cr. Cas. 247. [See 28 D.L.R. 372, 25 Can. Cr. Cas. 214, 9 A.L.R. 319, 33 D.L.R. 702, 27 Can. Cr. Casl 247.]

(§ III E—261)—CRIMINAL CASE—REASONABLE DOUBT.

In a criminal case it is for the jury to decide whether there is reasonable doubt, and when instructed that they should convict only if guilt be shewn beyond a reasonable doubt, their verdict of guilty is not to be disturbed on the ground that they ought to have had a reasonable doubt if there was evidence from which a reasonable inference of guilt could be made. (Per Stuart, J.)

Rex v. Green; Rex v. Bosomworth (Alta.), 29 Can. Cr. Cas. 425.

IV. Findings by the Court.

Review of, see Appeal.

V. Verdict or finding of jury.

A. In general.

(§ V A—270)—General verdict—Specific questions.

The law of British Columbia is that a jury may find a general verdict and ignore specific questions put to them, but if questions are put to them which they answer, a general verdict inconsistent with the answers to such questions will be set aside.

Bank of Toronto v. Harrell, 39 D.L.R. 262, 55 Can. S.C.R. 512, reversing 31 D.L.R. 440, 23 B.C.R. 202.

Damages—Mental sufferings—Railway—Speed at crossing.

It has been the general practice of courts for many years to leave in the hands of the jury to determine of the total amount of the damages suffered by the victim of an accident as a single amount, without requiring them to specify the amount of damages caused by the several sources of damages. A Judge does not go beyond his functions in instructing the jury that they had no right to grant damages for mental sufferings, and in requiring them to consider this verdict so as to leave out mental sufferings. It is most imprudent for a car on a railway track, where it crosses tracks running at right angles, to cross at high speed immediately behind another car. The jury in their verdict may take into consideration facts which, although not specifically alleged in the declaration, are the natural consequence of the cause of the accident mentioned by plaintiff.

Merry v. Montreal Tramways Co., 53 Que. S.C. 226.

Derailment of car—Speed.

It is a Judge's duty to examine carefully the jury's verdict and to see that it is rendered in a legal way. So, when a jury is of the opinion that the derailment of a tramcar was caused by the speed at which the car was going, and included in its verdict the words "the too great speed," a ground which was not pleaded in the action, the jury, under the direction of the Judge, may strike these words out of its verdict.

Fortin v. Montreal Tramways Co., 54 Que. S.C. 428.

(§ V A—272)—Judge directing jury to answer questions.

Under sec. 61 of the Ontario Judicature Act, the Judge, instead of directing the jury to give either a general or a special verdict, may direct the jury to answer any questions of fact stated to them by him. The jury's answers to the questions so stated are not a verdict within the meaning of sec. 35 (4) of the Act (R.S.O. 1914, ch. 56).

Rowan v. Toronto R. Co., 43 D.L.R. 564, 43 O.L.R. 164, 14 O.W.N. 237, affirming 14 O.W.N. 173.

C. Sufficiency and correctness.

(§ V C—280)—Evidence to support.

When the meaning to be given to the finding of the jury is that the leaving of one of the gates at a railway crossing open was an invitation to the driver of a truck that he might safely cross the tracks, and where there is evidence to support this finding and also a finding against contributory negligence, the findings will not be disturbed.

Armstrong Cartage and Warehouse Co. v. Grand Trunk R. Co., 43 D.L.R. 122, 42 O.L.R. 660.

Reconsideration—Substituted answer.

When it appears to the trial Judge from the answers brought in by the jury that a point has not been made clear to them, the Judge may further instruct the jury and send them back to reconsider their answer to one of the questions, and upon the return of the jury with a substituted answer to such question may properly receive and act on the substituted answer.

Dowson v. Toronto and York Radial R. Co., 43 D.L.R. 377, 43 O.L.R. 158.

(§ V C—285)—Misdirection—Miscarriage.

When the finding of a jury is not reasonable upon the facts, and it is apparent that a miscarriage of justice has taken place owing to the jury not thoroughly understanding the points put to it, because it has not been sufficiently instructed by the trial Judge, the verdict will be set aside.

Jackson v. B.C. Electric R. Co., 38 D.L.R. 145, 24 B.C.R. 484.

Verdict against evidence—Claim and counterclaim — Judgment — Pleading—Estoppel.

In an action to recover certain live stock, which the defendant had removed from a farm, which the plaintiff had leased, together with the farm, to the defendant, the defendant admitted the removal of the stock, but claimed to have substituted other stock of equal value. On the trial the Judge directed the jury that the defendant had no right to remove the stock and substitute other stock instead, even though such substituted stock was of equal or greater value than that removed. Notwithstanding this direction, the jury found the stock removed belonged to the defendant. Held, that the finding should be set aside as against evidence, and perverse. Held, further, that as estoppel had not been pleaded or raised on the trial it was not open to the defendant to contend, on the motion to set aside the verdict or for a new trial, that the plaintiff by his conduct allowed the defendant to assume that he could substitute stock for that removed, and was estopped from claiming title to the stock removed.

Rush v. Clark, 45 N.B.R. 393.

Condition of machinery—Review on appeal.

An expression in a jury's verdict that "machines were defective," or "machines were not in first class condition," have the same meaning. When the evidence upon

the defectiveness of a machine is contradictory, jurymen may reasonably reach the conclusion that the machine was in bad condition, and one cannot say that any other verdict should have been given. Besides, a Court of Appeal ought not, in such circumstances, to change a verdict.

Montreal Ammunition Co. v. Parent, 27 Que. K.B. 558.

(§ V C—290)—CONVICTION—QUASHING BY APPELLATE COURT.

A conviction under sec. 355 C.C. will be quashed where the evidence does not shew that the person who receives the money is a person who stands in the relation of an agent to the person to whom he is to pay or account, but shews that he is a person who, by virtue of some contract under which there are mutual obligations, is under an obligation arising out of the contract to pay or account.

Rex v. Mackay (Alta.), 40 D.L.R. 37, 29 Can. Cr. Cas. 194, [1918] 1 W.W.R. 945.

"GUILTY WITHOUT HIS KNOWLEDGE."

Knowledge is not an ingredient of the offence created by sec. 490 (b) of the Criminal Code; a verdict by the jury of "guilty without his knowledge" is in effect a verdict of guilty.

The King v. Newcombe, 40 D.L.R. 85, 52 N.S.R. 85, 29 Can. Cr. Cas. 249.

D. AMENDMENT OR CORRECTION.

(§ V D—295)—WEIGHT OF EVIDENCE.

All possible weight should be given to the verdict of a jury, but, when viewing the case from every standpoint, it appears that the verdict is against the weight of evidence, and the verdict as rendered is such as could not reasonably have been found, such verdict may be set aside and judgment entered in accordance with the weight of evidence.

Hallett v. Bank of Toronto (N.B.), 43 D.L.R. 115.

E. REMITTITUR; SETTING ASIDE.

(§ V E—300)—REOPENING CASE—NEW EVIDENCE.

Subsequent to the trial, but before judgment therein, the defendants applied to reopen the trial in part and for leave to introduce in evidence a certain agreement in writing that at the trial the defendants had failed to produce and in respect of which the trial Judge declined to allow secondary evidence. Held, on this motion, that in a proper case the trial Judge may in his discretion, until judgment has been delivered, reopen the trial, but that such discretion should be exercised only with the greatest care, and that it would be opening too wide a door to permit a party after practically learning that the finding of the court was adverse to him on the facts (as in the present case) to seek to supplement his proof by the production of documents which he should and well knew he should, have had at the trial.

Calder v. International Harvester Co., 11 S.L.R. 244, [1918] 2 W.W.R. 905.

TROLLEY.

See Street Railways.

TRUSTS.

I. CREATION; VALIDITY; TERMINATION.
A. In general.
B. Express or declared trusts; precatory trusts.
C. Parol trust; Statute of Frauds.
D. Implied, constructive and resulting trusts.
E. Revocation.
F. Termination; release; discharge.
II. TRUSTEES.
A. Appointment; capacity; resignation; removal; number.
B. Rights, powers, duties and liabilities.
C. Suit for instructions.
III. INTEREST OF CESTUI QUE TRUST; RIGHTS OF CREDITORS; SPENDTHRIFT TRUST.
A. In general.
B. Rights of creditors; spendthrift trusts

Annotation.

Appointment of trustees and receivers in charge of enemy companies and firms during war: 23 D.L.R. 375, 379.

I. Creation; validity; termination.

A. IN GENERAL.

See Wills.

(§ I A—1)—ABSOLUTE CONVEYANCE.

A deed of land, although absolute in form, will only be enforced in a Court of Equity, subject to such trusts and conditions as the circumstances of the case shew were intended.

May v. Hainer, 38 D.L.R. 586, 40 O.L.R. 436.

MONEY IN BANK—CHEQUE—LIQUIDATOR.

Money received from certain co-debtors, and deposited in a bank, against which the trustee has drawn a cheque, is impressed with a trust and is payable to the drawer as against the liquidator of the trustee.

Merchants Bank v. Thomson (Alta.), 39 D.L.R. 664, [1918] 1 W.W.R. 972. [Reversed by the Supreme Court of Canada.]

TRUSTS—PURCHASE OF LAND AT MORTGAGE SALE—AGREEMENT TO HOLD IN TRUST FOR OWNER OF EQUITY OF REDEMPTION—EVIDENCE—FAILURE TO ESTABLISH TRUST—CONSPIRACY—FAILURE TO PROVE.

Fruchtenan v. Gurofsky, 14 O.W.N. 23.

D. IMPLIED, CONSTRUCTIVE AND RESULTING TRUSTS.

(§ I D—22)—MORTGAGEE—ASSIGNMENTS AND PREFERENCES ACT—LIMITATIONS.

A mortgagee of land which formed part of an estate which had been assigned for the benefit of creditors is not by virtue of the Assignments and Preferences Act, R.S.O. 1897, ch. 147, nor of the terms of the resolution of the creditors appointing him one of the inspectors of the estate—with power in conjunction with the assignee, to realise upon the estate to the best advantage—constituted an express trustee, nor is he under

the same liability as an express trustee in respect of the equity of redemption conveyed to him by the assignee; at most he is a constructive trustee; the Statute of Limitations applies to a constructive trust and may be invoked by a constructive trustee in answer to a claim for recovery of the property upon which the trust is in equity impressed, if there has been no concealed fraud which could not have been discovered by the exercise of reasonable diligence. [Segsworth v. Anderson (1894-5), 21 A.R. (Ont.) 242, 24 Can. S.C.R. 699, distinguished; Dictum of Moss C.J.O., in Re Canada Woollen Mills Limited (1905), 9 O.L.R. 367, 368, disapproved.]

Taylor v. Davies, 41 D.L.R. 510, 41 O.L.R. 403, reversing 39 O.L.R. 205.

PURCHASE OF HOTEL PROPERTY FOR COMPANY NOT IN EXISTENCE—FAILURE TO FORM COMPANY—PURCHASER NAMED BY PROMOTERS—USE OF PURCHASER'S OWN MONEY TO MAKE DOWN-PAYMENT — ACTION BY PROMOTER FOR DECLARATION OF TRUST FOR COMPANY—DISMISSAL ON FACTS.

Boehmer v. Kelly and Selby, 14 O.W.N. 182.

II. Trustees.

B. RIGHTS, POWERS, DUTIES AND LIABILITIES.

(§ II B—45)—MORTGAGE HELD BY TRUST-CORPORATION UNDER MARRIAGE SETTLEMENT—RIGHTS OF BENEFICIARIES—COMPENSATION OF TRUSTEE.

A trust corporation, trustee under a marriage settlement, had in its hands, as a part of the trust estate, a certain mortgage for a large sum. The shares of the beneficiaries, infant and adult, under the settlement, had been declared to be vested and not subject to be divested:—Held, that the trustee-corporation could not insist upon retaining the mortgage until complete realisation; the beneficiaries could elect to take it in specie; and, upon their application, the corporation was ordered to assign the mortgage to the Accountant of the Supreme Court of Ontario to hold in trust for them. Remarks upon the vicious system by which a trustee is allowed an arbitrary percentage upon the money which passes through his hands.

Re Hughes, 42 O.L.R. 345, reversed in 15 O.W.N. 7.

DEFAULTING TRUSTEE-COMPANY — PAYMENT BY SURETIES OF AMOUNT DUE TO TRUST ESTATE—CLAIM OF TRUSTEE AGAINST LIFE-TENANTS FOR MONEYS IMPROPERLY PAID AND RECEIVED — SUBROGATION — RIGHT OF SURETIES — LIQUIDATOR OF TRUSTEE-COMPANY — ATTORNMENT TO JURISDICTION OF ONTARIO COURT.

Re Beck Trusts, 14 O.W.N. 233.

PURCHASE OF RESIDENCE FOR CESTUI QUE TRUST—DEPARTURE FROM TERMS OF TRUST DEED—CONSENT OF ALL PERSONS INTERESTED—DECLARATION—COSTS.

Re Bacque Trusts, 15 O.W.N. 33.

CONVEYANCE OF LAND TO DEFENDANTS—PAROL AGREEMENT WITH PLAINTIFF TO SELL AND FOR PAYMENT TO HIM OF SURPLUS OF PROCEEDS OF SALE AFTER PAYMENT OF WHAT IT "COST" DEFENDANTS — ENFORCEMENT OF TRUST — ASCERTAINMENT OF "COST"—DEDUCTION FOR IMPROVEMENTS — CLAIM FOR WAGES—SERVICES RENDERED BY MEMBER OF HOUSEHOLD.

McKibbon v. Welbanks, 15 O.W.N. 153.

MORTGAGE — DRAFT — DISCOUNT — BREACH OF TRUST.

The plaintiff having agreed to take a certain mortgage, the defendant company drew upon him for the amount of the loan, discounted the draft and deposited the proceeds in the general bank account of the company. The moneys coming from the plaintiff were paid by him into the branch of the defendant company at Charlottetown. Held (per Macdonald, C.J.A., Galliher and Eberts, JJ.A., McPhillips, J.A., dissenting), that the proceeds of the draft were the plaintiff's money at the time of discount (he having, per Macdonald, C.J.A., assented to the company's proposal to draw; his acceptance of the draft being, per Galliher, J.A., a ratification equivalent to prior authority), and, therefore, he was entitled to follow them.

Dalton v. Dominion Trust Co. (B.C.), [1918] 3 W.W.R. 42.

(§ II B—49)—MONEY IN BANK — INVESTMENTS—WITHDRAWALS BY CHEQUE.

A trustee authorized by the legislature to hold money on deposit pending investment and pay interest on the same may agree with its cestui que trust that pending such investment, and even afterwards, the cestui que trust may withdraw such sums as he wishes and may use cheque forms for making such withdrawals.

Re Dominion Trust Co.; U.S. Fidelity's Case; Reid's Case; Ramsay's Case (B.C.), [1918] 3 W.W.R. 1023.

(§ II B—57)—REFERENCE TO FIX COMPENSATION OF TRUSTEES FOR CARE, PAINS, TROUBLE, AND TIME EXPENDED IN RESPECT OF PART OF TRUST ESTATE—TRUSTEE ACT, SEC. 67—SCOPE OF REFERENCE — SCALE OF ALLOWANCE FIXED BY SURROGATE COURT WITH REGARD TO OTHER PARTS OF ESTATE—QUANTRUM OF ALLOWANCE—PERCENTAGE—REASONABLE SUM.

Re Hughes, 15 O.W.N. 72, reversing 42 O.L.R. 345.

III. Interest of cestui que trust; rights of creditors; spendthrift trust.

A. IN GENERAL.

(§ III A—60)—PAYMENT OF TRUSTEE'S MORTGAGE WITH TRUST FUNDS—SUBROGATION—LIEN—PRIORITIES.

Where a trustee applies moneys which he holds in trust towards paying off a mortgage

on land of which he is the owner or one of the owners, the cestui que trust is entitled to be subrogated to the rights of the mortgagee. The fact that at the time the mortgage was given the trustee was beneficially entitled to only an undivided interest in the land, and held the remainder of the beneficial interest in trust for the beneficial owner thereof, does not give priority over the mortgage to a lien subsequently established by such other owner, where the mortgagor was the sole registered owner, and there was nothing of record to show the interest of another in the land.

McCullough v. Marsden Estate (Alta.), [1918] 3 W.W.R. 725. [Affirmed on appeal.].

MONEY USED IN PURCHASE OF LAND—MORTGAGE—PRIORITIES.

Part of the plaintiff's money was in breach of trust lent to one von Alvensleben and von Alvensleben, Limited, to purchase land which they subsequently mortgaged to the defendant company, and the company notified the other defendants, certain Scottish investors, that the moneys forwarded by them to the defendant company for investment had been placed in said mortgages and "guaranteed first mortgage investment certificates" were issued by the company to said investors. The mortgage from von Alvensleben Limited was not registered as required by sec. 102 of the Companies Act. Held, that the defendants, the Scottish investors, were purchasers for value without notice of the plaintiff's interest, and were in priority to him, and that as the plaintiff was not a purchaser, mortgagee or creditor in relation to von Alvensleben Limited, he was not entitled to avail himself, under said section, of the fact that the mortgage from said company was not registered.

Dalton v. Dominion Trust Co. (B.C.), [1918] 3 W.W.R. 42.

ULTRA VIRES.

See Companies; Municipal Corporations; Constitutional Law.

Annotation.

Ultra vires as defence in actions on corporate contracts: 36 D.L.R. 107.

UNDUE INFLUENCE.

As affecting validity of instruments, see Wills; Deeds; Contracts; Bills and Notes; Mortgage.

UNJUST DISCRIMINATION.

See Carriers, IV.

USEFUL OCCUPATION.

(§ I—1)—PAID OFFICIAL OF LABOUR ORGANIZATION.

Where the only evidence before the magistrate, on a charge of violation of the provisions of order-in-council No. 815, April, 1918, as to the occupation of the accused is that he is the paid official of a labour organization, which is recognized by such order-in-council as not illegal, there can be no reasonable inference that he is not engaged in a useful occupation.

Rex v. Ruttka (Alta.), 42 D.L.R. 276, 30 Can. Cr. Cas. 172, [1918] 2 W.W.R. 788.

USURY.

See Interest.

VAGRANCY.

Annotation.

Living on the avails of crime or prostitution: 30 D.L.R. 339.

(§ II—5)—PROSTITUTION.

On a charge of vagrancy brought under Code sec. 238 (i) for being a common prostitute wandering in the streets, the arrest by a police officer and the subsequent prosecution and conviction of the accused will be justified if the woman was caught in the act of soliciting, although the police officer did not before arresting her ask her to give "a satisfactory account of herself" (Code sec. 238 (i)).

Rex v. Jackson, 29 Can. Cr. Cas. 352, 40 O.L.R. 173, 12 O.W.N. 315, affirming 12 O.W.N. 191. [See 12 O.W.N. 77, 161.]

Where a woman's only visible means of maintaining herself is by prostitution, she is liable to summary conviction for vagrancy under Cr. Code sec. 238 (a), making it an offence for a person not having any visible means of maintenance to live without employment.

Rex v. Cyr, 38 D.L.R. 601, 12 A.L.R. 320, 29 Can. Cr. Cas. 77, affirming 12 A.L.R. 320.

VALUATION.

See Damages; Expropriation; Taxes.

VENDOR AND PURCHASER.

I. RIGHTS AND LIABILITIES OF PARTIES.
A. In general.
B. Payment of purchase money; deductions.
C. Defective or unmarketable title.
D. Deficiency in quantity.
E. Rescission of contract.
II. VENDOR'S LIEN; FORECLOSURE.
III. RIGHTS OF PARTIES AS TO THIRD PERSONS; BONÂ FIDE PURCHASERS.

See also Contracts, II; Mortgage; Land Titles; Registry Laws.

Annotations.

Contracts; part performance; Statute of Frauds: 17 D.L.R. 534.

Equitable rights on sale subject to mortgage: 14 D.L.R. 652.

Payment of purchase money; purchaser's right to return of, on vendor's inability to give title: 14 D.L.R. 351.

Sale of land; rescission for want of title in vendor: 3 D.L.R. 795.

When remedy of specific performance applies: 1 D.L.R. 354.

Right of rescission for misrepresentation, and waiver of: 21 D.L.R. 329.

Foreclosure actions affected by moratorium: 22 D.L.R. 865.

Assumption of mortgage debt upon transfer of mortgaged premises: 25 D.L.R. 435.

Vague and uncertain contracts, as affecting specific performance: 31 D.L.R. 485.

Rescission of contract for fraud and damages for deceit: 32 D.L.R. 216.

Registration, caveats, notice: 33 D.L.R. 9.

I. Rights and liabilities of parties.

A. In general.

As affected by War Relief Act, see Moratorium.

(§ I A—1)—Purchaser's duty to indemnify vendor.

The rule of equity, that a purchaser is bound to indemnify his vendor against the payment of encumbrances upon the estate which, by the terms of the purchase the purchaser assumes and the amount of which is deducted from the consideration, does not apply against a purchaser in favour of a person who, although he actually made the conveyance, was not the vendor.

Peterson v. Wickson (Man.), [1918] 2 W.W.R. 259.

Agreement for sale of land—Breach by vendors—Conveyance to another purchaser—Damages for breach.

Pilkey v. Pyne, 15 O.W.N. 162, reversing 14 O.W.N. 308.

Warranty—Apparent defects.

A clause in a deed of sale "with warranty of all troubles and evictions" is only verbiage, and does not add anything to the legal warranty by which the vendor is bound. Defects in the foundation, pillars and beams of a house, are apparent defects for which the vendor owes no warranty, and by ordinary examination the purchaser may notice such defects.

Laberge v. Gervais, 53 Que. S.C. 370.

Concurrent agreement—Option to rescind.

If a person buys land upon the faith of a circular announcing that the vendor undertakes to take back the property, with interest at 6% upon the money paid, if the purchaser is not satisfied with his investment, it is a concurrent agreement of sale, but is not one of the conditions of the sale.

Lachance v. Petit, 53 Que. S.C. 368.

Mistake—Will—Nullity of sale—Community.

When no will is found, and one of the heirs intestate purchases the share of another heir for $325, the purchaser may claim back the sum if it is discovered later that there is a will making him sole heir, to the exclusion of the vendor. His consent to the deed of sale is voided by error. If the vendor is a married woman, common as to property, and her husband is sued with her, and if it is proved that the husband had knowledge of his wife receiving $325, he will be condemned with her to return it to the purchaser. Although left by him in his wife's hands, the sum had no less fallen into the community.

De Repentigny v. Boucher, 24 Rev. Leg. 475.

B. Payment of purchase money; deductions.

(§ I B — 5) — Cheque — Consideration—Holder for value.

To agree to a sale of land upon receiving the cheque of the agent who brings about the sale is good consideration for the cheque, and the vendor of the land is a holder of the cheque for value.

Clavelle v. Russell, 40 D.L.R. 61, 11 S.L.R. 111, [1918] 1 W.W.R. 900.

Purchaser preventing title — Crown grant.

The purchaser of mill-site property under an agreement for sale whereby the final payment was to be made when the vendor obtained title from the Crown, having taken possession, and subsequently by his own conduct made it impossible for the vendor to obtain the Crown grant, is liable for the balance due notwithstanding the vendor's failure.

Meeker v. Nicola Valley Lumber Co., 39 D.L.R. 497, 55 Can. S.C.R. 494, affirming 31 D.L.R. 607. [Leave to appeal to Privy Council refused, February, 1918.]

Purchase money—Assignment by vendor—Notice—Caveat.

If notice of an assignment by the vendor of his rights under an agreement of sale of land has not been given to the purchaser, payment to the vendor of the balance due under the agreement will entitle the purchaser to a transfer of the land; a caveat, filed in the Land Titles Office after the assignment, is not notice, as such, to the purchaser, who is not bound to search the register before making payment. [See annotation, 33 D.L.R. 9.]

Grace v. Kuebler, 39 D.L.R. 39, 56 Can. S.C.R. 1, affirming 33 D.L.R. 1, 11 A.L.R. 295; 28 D.L.R. 753. [See 38 D.L.R. 149, 12 A.L.R. 392, [1918] 1 W.W.R. 182.]

Agreement for sale of land—Crop payment—Abandonment of agreement—Crop grown on other land—Injunction.

Stroscherer v. Schulz (Alta.), 40 D.L.R. 162.

Failure of attempt to prove abandonment by purchaser—Agreement as to collection of rents and payment of disbursements — Account — Specific performance—Costs.

Victor v. Romovitz, 14 O.W.N. 351.

Action for instalment of purchase money—Misrepresentations by agent of vendor—Failure to prove—Undertaking to resell—Acquiescence—Ratification—Evidence.

Davis v. Whittington, 15 O.W.N. 160.

PURCHASE MONEY PAYABLE BY INSTALMENTS —TITLE TO BE MADE AFTER DEFERRED PAYMENTS COMPLETED — DEFAULT BY PURCHASER—POSSESSION RESUMED BY VENDOR — INTENTION TO TERMINATE AGREEMENT NOT SHEWN—ACTION BY PURCHASER TO RECOVER PART OF PURCHASE MONEY PAID—COUNTERCLAIM FOR SPECIFIC PERFORMANCE — CLAIM FOR CONVERSION — JUDGMENT — ACCOUNT— DEDUCTIONS — DAMAGES — INTEREST — APPEAL—COSTS.

Mann v. Gray, 15 O.W.N. 181.

ACTION FOR BALANCE OF PURCHASE PRICE— DEDUCTIONS—INTEREST—COSTS.

Proctor v. Décarie, 15 O.W.N. 272.

SALE OF MINING CLAIM—FORFEITURE—RECOVERING BACK MONEYS PAID—AMENDMENT.

Motion to continue until the trial an injunction to prevent defendant from enforcing forfeiture of plaintiff's agreement to purchase a mining claim. The agreement contained the following provision: "Time is the essence of this agreement, and any failure on the part of the first party to make any of the said payments as herein provided or within thirty days thereafter shall work a forfeiture of all his rights under the agreement and the said agreement shall become null and void at the option of the second party, and the second party shall give written notice to the first party of his intention to claim said forfeiture, and thereupon this agreement shall be null and void and of no further force and effect, and all payments made by the first party or his assigns in pursuance of the terms hereof shall be retained by the second party." Held, by Galt, J., that a notice by the vendor, given before the expiration of thirty days, of his intention to claim forfeiture was ineffectual, and a further notice, given after default, claiming that the purchaser had forfeited all his rights under the agreement, was so doubtful in effect that the injunction should be continued until the trial. [Canadian Fairbanks Co. v. Johnston (1909), 18 Man. L.R. 589; Kilmer v. B.C. Orchard Lands, [1913] A.C. 319, 10 D.L.R. 172, followed. Steedman v. Drinkle, 25 D.L.R. 420, distinguished.] The plaintiffs were allowed to amend by claiming that, in the event of failure at the trial to establish their right to enforce the agreement, they should recover back all moneys paid under it.

Price v. Ruggles, 28 Man. L.R. 132.

RIGHT TO INTEREST—COVENANT TO PAY TAXES—RIGHT OF VENDOR—ACTION.

Where an agreement for the sale of lands provides that the seller is not to be liable to a personal action for the purchase money but that the vendor is "to look to the lands and all other rights and remedies to realise the purchase money and all of his rights," and also provides that all overdue interest shall be treated as purchase money, overdue interest cannot be recovered by personal action against the purchaser; but where the agreement also contains a covenant by the purchaser to pay taxes from a certain date, such taxes, if paid by the vendor, may be recovered by perscnal action.

Parker v. Trustee Co., of Winnipeg (Man.), [1918] 2 W.W.R. 264.

STIPULATION AS TO TIME—SPECIFIC PERFORMANCE—OPTION OF AGREEMENT.

The purchasers under an agreement for the sale of land being unable to maintain their payments obtained from their vendor an offer by him to accept a certain amount in money and a quit claim deed, the offer to hold good until a certain date. The money was not paid by that date, although arrangements were completed about a month later for its payment through a bank after approval by the purchaser of the documents to be executed by the vendor. The purchaser sued for specific performance of the agreement for reconveyance. Held, that if the correspondence amounted merely to an option, the view taken by the trial Judge, it had expired because not exercised within the time limited, and that, if the agreement ought to be regarded as a contract for the sale or reconveyance of land, the stipulations by the defendant as to time made time of the essence of the contract and, therefore, under the rule of Brickles v. Snell, [1916] 2 A.C. 599, 30 D.L.R. 31, the plaintiffs were not entitled to specific performance.

Freehold Investment Co. v. Westland (Man.), [1918] 3 W.W.R. 312.

PERFORMANCE — TENDER — JUDGMENT — CROSS DEMAND—REPUDIATION OF CONTRACT.

In a reciprocal contract, performance thereof on both sides should be made simultaneously, and neither of the contracting parties can be compelled to execute his obligation before the other party performs his. In a sale the vendor has a right to the price only when he has offered the thing sold, or at least offers it in his action; it is not sufficient that he should declare himself ready to make delivery. A Court cannot render a conditional and hypothetical judgment, such as condemning the defendant to pay the price of a thing sold upon the delivery thereof. A vendor who retains the property and possession of the thing sold, cannot sue for the sale price without making legal tender of the thing, and if the purchaser unjustly repudiates the contract the vendor has a remedy in damages against him, but he cannot at the same time, keep the thing sold and claim the price. Any cancellation of a contract having, as a rule, to be made by the Courts, the purchaser, after having put his vendor in default to deliver him the thing sold, cannot, on the latter's refusal, consider the contract as cancelled and sue to claim back the instalments paid on account; and should he do so by a cross demand, without asking the Court to declare the sale void, his demand will be dismissed.

Robert v. Sarault, 53 Que. S.C. 484.

TENDER—DELAY—CONDITIONAL JUDGMENT.

In a bilateral contract, the carrying out of the obligations by each of the parties should be concurrent. So a purchaser of real property, before bringing an action for delivery and execution of deed, should, within the time agreed upon, make a legal tender of the price or of the part of the price of sale which could be demanded, and deposit the money in Court with his action. Courts cannot supply such want of tender and deposit by decreeing, as a condition of the judgment and delivery of the property, that the purchaser should pay what is due on the price of sale within a delay fixed.

Desjardins v. Bélanger, 54 Que. S.C. 77.

FORFEITURE CLAUSE.

A clause in a deed of sale providing that "if the purchaser or his representatives make default in the first or any payment of the day for payment or within 60 days after and likewise the payments of interest each year, the sale shall be cancelled of right in favour of the vendor, who shall have the right to reenter into the possession and the ownership of the property above sold, without any formal demand, demand of payment or other formality of law, and without being bound to reimburse the purchaser any sum for money received on account and for improvements made upon the said property," only admits that the agreement shall be automatically cancelled by the single omission of the purchaser to make one of the payments agreed on; the vendor must signify to the purchaser his wish to take advantage of the provision for cancellation.

Perreault v. Foncière Victoriaville, 54 Que. S.C. 249.

PACTE COMMISSOIRE—DEFAULT OF PAYMENT.

A clause in a deed of sale, which stipulates "that on default of the purchaser making any payment within 60 days of the date when it becomes due, the sale shall become void and of no effect, without the vendor being required to make restitution of any money previously paid," only constitutes an ordinary pacte commissoire stipulated in favour of the vendor; and the purchaser who is behind in his payments cannot take advantage of it. A clause in an act of sale containing a pacte commissoire, cannot be explained by witnesses.

Mountain Sights v. Dagenais, 53 Que. S.C. 372.

PAYMENT—CUSTOM—CHEQUE—ERROR.

Where the custom followed between vendor and purchaser, as to the monthly payments due by the latter, was that about the beginning of each month, an unaccepted cheque was mailed to the vendor and accepted by him as payment, the vendor cannot, after some trouble has arisen between them, receive cheques, keep them in his possession, and, afterwards, deny having received them as payment. A small error in the amount of a cheque given in payment of a debt, resulting from the common error of the creditor and the debtor, does not annul the payment and does not constitute the debtor in default to pay.

Paxton v. Walker, 53 Que. S.C. 281.

NOTICE OF SALE—RETENTION OF PRICE—SECURITY—DEFECTIVE TITLE.

Art. 1352 C.C.P. (Que.), which provides that the notice in the papers should be inserted "15 days at the latest before the sale," does not mean that not more than 15 days should elapse between the publication of the notice and the sale, but it should be understood to mean that the notice itself ought not to be given later than 15 days before the sale, namely, that there should be at least 15 days between the notice and the sale. (By the Superior Court): The purchaser of an immovable, who might be disturbed by a third person because of defects in the title to the property, cannot keep back payment of the price or require the vendor to furnish him with security.

Hudon v. Connolly, 24 Rev. Leg. 23.

ASSIGNMENT OF AGREEMENT—EFFECT.

Held, that the agreement of sale and the assignment thereof should be interpreted together, and constitute but one contract, namely, a sale; and the vendor, not having been able to give a title to the purchaser, because he had only an option, cannot sue the purchaser for the price stipulated in the assignment.

Dansereau v. Dubois, 24 Rev. Leg. 66.

TITLE—FRANC ET QUITTE.

In the case of a promise of sale of immovables for $31,000, payable $3,000 cash, $3,000 3 months later, and the balance at various times, the purchaser being entitled to a deed of sale at the time of the second payment, with the clause "franc et quitte," the vendor having to furnish all his title deeds and a certificate of search, the purchaser cannot be compelled to pay the last mentioned $3,000 before the vendor has furnished him with his title deeds and a certificate of the registrar.

Ross v. Amiot, 24 Rev. Leg. 281.

C. DEFECTIVE OR UNMARKETABLE TITLE.

(§ I C—10)—INABILITY TO FURNISH TITLE.

Herman and Lawson v. Blain, 42 D.L.R. 785, 11 S.L.R. 288, [1918] 2 W.W.R. 1014.

"TITLE BY POSSESSION"—IDENTIFICATION OF LAND—PAROL EVIDENCE—ADMISSIBILITY—APPURTENANCE.

B. agreed to buy and R. agreed to sell a property described in the written agreement of purchase and sale as: "House and premises number 115 Wolseley street, Toronto, with appurtenances and vacant lot adjoining to the west (up to the east wall of house number 119 Wolseley street) having a frontage of at least 51 feet by an even width of at least 110 feet to Willis street in the rear; the said premises having a frontage on Wolseley and Willis streets." There was a proviso in the agreement that the title should be "good

and free from all incumbrances" and "not altogether or in part a title by possession." In 1856, a parcel of land which the vendor said was the same as that which he now agreed to sell, was conveyed to a predecessor in title of the vendor by a deed in which the land was described as being composed of lots 3 and 4 on the south side of E. (now Wolseley) street as shewn on a plan of the property of H. adjoining the property of R. as surveyed by U., having a frontage on E. street of 52 feet by 117 feet 6 inches in depth to a lane, be the same more or less. And the same description was used in subsequent conveyances. The plan referred to was not registered; and none of the measurements on the ground corresponded with the deed. Evidence was taken by a referee upon a reference directed by the Court when an application under the Vendors and Purchasers Act was made. Held, upon appeal from the referee's finding, that a title which depended at any point upon possession under the Statute of Limitations, and so was not wholly a paper title, was a title by possession, within the words of the agreement. Held, also, that parol evidence was admissible to shew that "lots 3 and 4" was the name of the whole parcel occupied by the vendor and his predecessors in title and was the property described in the agreement, and that the acts of the parties might be given in evidence to interpret the description in the conveyance. [Waterpark v. Fennell (1859), 7 H.L.C. 650; Lyle v. Richards (1866), L.R. 1 H.L. 222; Van Diemen's Land Co. v. Marine Board of Table Cape, [1906] A.C. 92, followed.] And held, that the evidence established that for upwards of 29 years the block of land described in the agreement had been occupied as and for lots 3 and 4 by J. and son, first as tenants and then as owners; that the block was wholly enclosed either by buildings or walls; that the lands were so occupied by J. and son and their successors as of supposed right, and not as trespassers or intruders; and that the whole of the land described in the agreement was land to which the vendor had a paper title under the conveyance to him of lots 3 and 4. And semble, that, if the westerly strip did not form part of lots 3 and 4, nevertheless under sec. 15 of the Conveyancing and Law of Property Act, R.S.O. 1914, ch. 109, the whole of the land described in the agreement passed to the predecessors of the vendor as lots 3 and 4 and hereditaments appurtenant thereto. [McNish v. Munro (1875), 25 U.C.C.P. 290; Hill v. Broadbent (1898), 25 A.R. 159, distinguished. Willis v. Watney (1881), 45 L.T.R. 739; Winfield v. Fowlie (1887), 14 O.R. 102; Fraser v. Mutchmor (1904), 8 O.L.R. 613, followed.] Finding of the referee in favour of the vendor's title affirmed.

Re Brenzel and Rabinovitch, 42 O.L.R. 394.

SALE OF LAND—EVIDENCE—MISTAKE IN DESCRIPTION—RECTIFICATION OF AGREEMENT.

Pacaud v. Lebrecque, 14 O.W.N. 318.

VENDOR'S ABILITY TO MAKE TITLE—DELAY—TIME FOR MAKING TITLE—NOTICE—WAIVER BY SUBSEQUENT TENDER OF CONVEYANCE — UNREASONABLY SHORT TIME—SPECIFIC PERFORMANCE—BUILDING RESTRICTIONS—COVENANT—OBJECTION TO TITLE—WAIVER.

Miller v. Young, 14 O.W.N. 130.

OBJECTION TO TITLE—SHERIFF'S DEED—SALE OF EQUITY OF REDEMPTION—EVIDENCE—AGREEMENT TO PAY OFF MORTGAGE—SALE OF PART OF LAND SUBJECT TO MORTGAGE — EVIDENCE — VALIDITY OF SALE AND DEED.

Re Hewitt and Armstrong, 14 O.W.N. 139.

SUBDIVISION OF BLOCK—OBJECTION TO TITLE—BUILDING RESTRICTIONS—COVENANT OF GRANTEE—PROTECTION OF LAND RETAINED BY ORIGINAL VENDOR—COVENANT ENFORCEABLE AGAINST PURCHASER FROM COVENANTOR.

Foley v. Lipson, 14 O.W.N. 269.

SALE OF UNDIVIDED INTEREST IN LAND—PROOF OF VENDOR'S TITLE—HIGHWAY SHEWN ON REGISTERED PLAN—RIGHTS OF MUNICIPALITY AND OF PERSONS PURCHASING ACCORDING TO PLAN—APPLICATION UNDER VENDORS AND PURCHASERS ACT.

Re Knowles and Lawrason, 14 O.W.N. 284.

INABILITY OF PURCHASER TO MAKE TITLE TO SMALL PORTION—FAILURE TO AGREE UPON SUM AS COMPENSATION—ABSENCE OF CONSENT TO PERFORMANCE OF CONTRACT AND TO FIXING OF COMPENSATION BY COURT—RIGHTS OF PARTIES AS TO SUM PAID BY PURCHASER ON ACCOUNT OF PURCHASE MONEY — RESCISSION — FORFEITURE—REPAYMENT TO PURCHASER—PROVISIONS OF CONTRACT—INTEREST—COSTS.

Bowes v. Vaux, 15 O.W.N. 61.

OBJECTIONS TO TITLE—POWER OF APPOINTMENT—VALIDITY OF EXECUTION—CONVEYANCING AND LAW OF PROPERTY ACT, SEC. 24—DISCHARGE OF MORTGAGE MADE TO EXECUTORS—NECESSITY FOR EXECUTION BY ALL—PROVISIONS OF WILL.

Re Spellman and Litovitz, 15 O.W.N. 107.

OBJECTIONS TO TITLE—BUILDINGS ENCROACHING ON OTHER LAND—FAILURE TO SHEW EASEMENT—ABATEMENT OF PURCHASE MONEY—APPLICATION UNDER VENDORS AND PURCHASERS ACT — DISMISSAL — COSTS.

Re Davis and Moss, 15 O.W.N. 111.

OBJECTION TO TITLE—BUILDING RESTRICTIONS—APPLICATION UNDER VENDORS AND PURCHASERS ACT—CONFLICTING AFFIDAVITS — DIRECTION FOR TRIAL OF QUESTIONS ARISING UPON ORAL EVIDENCE.

Re Foster and Rutherford, 15 O.W.N. 113.

SALE OF LAND (HOUSE AND LOT BY STREET NUMBER)—CONVEYANCE OF LOT ACCORDING TO PLAN OF SURVEY—COVENANT FOR

TITLE—EXTENDED MEANING OF, BY SHORT FORMS OF CONVEYANCES ACT—HOUSE ENCROACHING ON NEXT LOT—REMOVAL OF HOUSE—COST OF—DAMAGES RECOVERED BY PURCHASER AGAINST VENDOR—EQUITABLE RIGHT TO REFORMATION OF DEED OF CONVEYANCE.

Hickman v. Warman, 15 O.W.N. 201.

LACK OF TITLE—RESTRICTIVE COVENANT—RIGHT OF PURCHASER—MEASURE OF DAMAGES.

In an action to recover the balance of the purchase price due upon an agreement for the sale of land, the defence that the plaintiff has no title or had none when the action was begun, is met by evidence that, before action, the owner had agreed to give the plaintiff a transfer, on payment to him of the amount due from the defendant to the plaintiff, and by filing in Court a transfer to the defendant to be delivered to the defendant on the fulfilment of the above condition. Where an agreement for the sale of lots in a city block provides that the vendors, when selling the adjoining block, will provide with the purchaser thereof that the lots therein will be made to front in a specified direction, and subsequently to the making of such agreement the plan which includes the adjoining block is cancelled by the owner with the consent of the vendor, but without the consent or knowledge of the purchaser, the latter is entitled to damages, and in assessing such damages it will be assumed that such covenant is incapable of performance and never will be performed. The amount of damages is the difference between the values of the block sold with such a covenant as to the adjoining block and without the covenant.

Queen's Park Corp. v. Levenick (Sask.), [1918] 1 W.W.R. 549.

LACK OF TITLE TO MINERALS—POSSESSION.

A purchaser under an agreement for the sale of land who has gone into possession thereunder and who seeks to repudiate the agreement because of defects of title must give up the possession and all claim to a right thereof under the contract in order to make the repudiation effective. [Innis v. Costello, 33 D.L.R. 602; Universal Land Co. v. Jackson, 33 D.L.R. 764, distinguished; Re Gloag & Miller's Contract, 23 Ch.D. 320, followed.]

Pemberton v. Cole (Alta.), [1918] 1 W.W.R. 269.

D. DEFICIENCY IN QUANTITY.

(§ I D—20)—MISTAKE AS TO QUANTITY—IMPLIED WARRANTY—RESCISSION.

The words "containing 271 acres" following the description of land as a definite part of a defined section, both parties being innocently mistaken as to the acreage which is in fact much less, do not amount to an implied warranty as to the quantity of land sold; after completion of the purchase, rescission will not be granted for deficiency.

Hansen v. Franz, 41 D.L.R. 457, 57 Can. S.C.R. 57, [1918] 2 W.W.R. 40, reversing 36 D.L.R. 349, 12 A.L.R. 406.

DESCRIPTION—"MORE OR LESS"—QUANTITY—SALE EN BLOC—PAROL EVIDENCE.

When in a sale of real property the latter is described by its official number, with an indication that it contains 70 arpents "more or less," to be charged the profit or loss of the purchaser, the deed mentioning no definite price, the sale is of a thing certain and determined, en bloc and not by quantity, and the purchaser has no claim against the vendor if the property contains only 55 arpents. An agreement after the sale, whereby the vendor consented to reduce the price if the property contained less than 70 arpents, cannot be proved by witnesses, and his consent to measure the land sold does not constitute a commencement of proof in writing.

Themens v. McDuff, 53 Que. S.C. 452.

(§ I D—29)—AGREEMENT FOR SALE OF LAND—ABSENCE OF WRITTEN CONSENT OF WIFE—FULL KNOWLEDGE OF TRANSACTION—DOWER ACT.

Choma v. Chmelyk, 40 D.L.R. 731, 13 A.L.R. 298, [1918] 2 W.W.R. 382.

E. RESCISSION OF CONTRACT.

(§ I E—25)—NO TITLE—REPUDIATION BY PURCHASER.

If the vendor in a contract for sale of land has no title in himself, or is not in a position to compel the registered owner to supply him with title, the purchaser may, as soon as he becomes aware of the fact, repudiate the contract and need not give the vendor time to secure title. [Forrer v. Nash, 35 Beav. 167, 55 E.R. 858; Bellamy v. Debenham, [1891] 1 Ch. 412, followed.]

Smith v. Crawford, 40 D.L.R. 224, 11 S.L.R. 170, [1918] 2 W.W.R. 298.

PURCHASER'S DEFAULT—NOTICE OF CANCELLATION—RETURN OF PART PAYMENT.

Where the real cause of the rescission of a contract to purchase land is the purchaser's default, and such purchaser does not seek specific performance nor submit his willingness to carry out the contract, he is not entitled to a return of the part payments made, when the vendor has given formal notice of cancellation. [Brickles v. Snell, [1916] 2 A.C. 599, 30 D.L.R. 31; Steedman v. Drinkle, [1916] 1 A.C. 275, 25 D.L.R. 420, distinguished.]

Walsh v. Willaughan, 42 D.L.R. 581, 42 O.L.R. 455.

LEASE OF LAND—RIGHT OF LESSOR TO SELL—ASSIGNMENT BY LESSOR—SALE OF LAND—SALE ABORTIVE—TERMINATION OF LEASE—RIGHTS OF LESSOR.

Rink v. Milos, 42 D.L.R. 782, 11 S.L.R. 271, [1918] 2 W.W.R. 1021.

CANCELLATION BY VENDOR — EVIDENCE — WAIVER OF RIGHT TO CANCEL—COUNTERCLAIM—MONEY LENT.

Diamond v. Western Realty Limited, 14 O.W.N. 94, affirming 12 O.W.N. 226.

EXCHANGE OF LANDS—TIME FOR COMPLETION — EXTENSION — WAIVER — PROVISION IN CONTRACT FOR RESCISSION—OBJECTION TO TITLE—QUESTION OF CONVEYANCE—NEGOTIATIONS AS TO OBJECTION —LAPSE OF TIME BEFORE ATTEMPTED EXERCISE OF POWER TO RESCIND.

Markle v. Mackay, 14 O.W.N. 280.

(§ I E—26)—MISTAKE—DESCRIPTION.

A description of real property in a deed of sale is equivalent to a warranty of the area of the piece of land, but, in order that the contract may be voided under this head it is necessary, under art. 1517 C.C. (Que.), that the part from which he finds himself evicted be of such importance in relation to the whole that the purchaser would not have acquired the property without this part. When a purchaser has a right of action for the voidance of a deed of sale of lands, and he offers to keep them on condition of a reduction in price, such offer must be considered as made with the intention of avoiding a lawsuit, and it has no effect if it is not accepted. It is an error sufficient to void a deed of sale, when a person buys two lots of land with a house and stable, and that these two buildings are located part on one of the lots bought and part on an adjoining lot, the purchaser not being able to perceive this fact, because the lots sold and the two adjoining lots were enclosed together, and appeared to make but one single estate.

Denis v. Deschamps, 54 Que. S.C. 74.

FALSE DESCRIPTION—SITUS—VALUE.

It is substantial error which will void sale when the lots sold are situated in a place other than that where the agent stated they were, and if, for that reason, they are of less value.

Boisjoly v. Land of Montreal Ltd., 24 Rev. Leg. 234.

ERROR AND FRAUD—AGENT—FALSE DESCRIPTION—FORFEITURE.

When agents of a vendor point out to the purchaser, as the situs of the land, a place other and less advantageous than that where the land actually is situated and the promise of sale describes the property as situated in the place falsely designated by the agents, the sale will be cancelled on the ground of error and fraud. If the promise of sale contains a clause that on default by the purchaser to make his payments when they become due, money paid up to that time shall be forfeited; and that to avoid this loss, he made the payments, his so doing cannot be considered as an acquiescence or a ratification of the promise of sale which would take away his right to ask for cancellation on the ground of error and fraud, even if the latter knew the reasons for cancellation at the moment of payment. It is the same if the purchaser, in order to avoid a lawsuit, tried to sell the property. The purchaser is not divested of his rights to have the sale cancelled if he only brings his action 11 months later, because a similar suit was pending in the Court, and he was awaiting the result. Besides, an action for cancellation of a sale of land on the ground of error and fraud is not a redhibitory action; and the delay named in art. 1530 C.C. (Que.) in which to bring it does not apply.

Denis v. Montreal Investment & Realty Co., 54 Que. S.C. 116.

MISTAKE—RIGHT OF WAY—NULLITY—PARTIES—NEGATORY ACTION.

One who owns several adjoining properties, and who sells one of them with "a right in common with others in the lane known under the number 1," namely, the neighbouring lot, cannot, in a negatory action to do away with this servitude, claim that he granted, by mistake, this right of way; such error is not contemplated by art. 992 C.C. (Que.). The purchaser of a lot of land upon which a servitude has been created, being the representative of his vendor, cannot plead the error.

Riopelle v. Papineau, 54 Que. S.C. 451.

(§ I E—27)—MISREPRESENTATIONS—TIMBER—QUANTITY.

A representation as to the estimated amount of timber on areas does not entitle a purchaser to a rescission of an agreement of sale if the estimate prove to be excessive where no fraudulent misrepresentation is shewn.

Alberta N. W. Lumber Co. v. Lewis, 38 D.L.R. 228, 24 B.C.R. 564, reversing 27 D.L.R. 722.

FRAUD—ELECTION OF REMEDIES.

A purchaser of land under an agreement for sale who, upon discovering that statements by the land agent, which led him to make the purchase are untrue, writes, through his solicitor, a letter to the brokers, enclosing money on the purchase and stating that he was completing it rather than lose the money already paid on the purchase price before he learned of the false and fraudulent representations made to induce him to purchase, and stating also that he does not waive his right to insist on reparation for the deceit practiced upon him, and that he proposes to bring an action on account thereof; and who subsequently makes additional payments and offers to exchange the lots for others, elects not to rescind the contract. Discovery later of other false representations does not entitle him to rescission, but entitles him to damages for deceit. [Campbell v. Fleming, 1 A & E 40, 110 E.R. 1122; Boulter v. Stocks, 10 D.L.R. 316, 47 Can. S.C.R. 440, discussed.]

Barron v. Kelly, 41 D.L.R. 590, 56 Can. S.C.R. 455, [1918] 2 W.W.R. 131, reversing 37 D.L.R. 8, 24 B.C.R. 283. [See [1918] 3 W.W.R. 466.]

FRAUD OF AGENT—MISREPRESENTATION.

An agent for the sale of land who, without knowledge or justification, makes false statements in regard to the land and thereby induces a sale to purchasers who rely on such representations, is liable in damages for such representations to the amounts paid on the

contracts of purchase, and as against the vendor company the purchasers are entitled to have the contracts rescinded. [Derry v. Peek (1889), 14 App. Cas. 337, followed.]

Yost v. International Securities Co. and MacPherson; Dannecker v. International Securities Co. and MacPherson, 43 D.L.R. 28, 42 O.L.R. 572, 14 O.W.N. 96, affirming 12 O.W.N. 410.

FRAUD AND MISREPRESENTATION—AGREEMENTS TO PURCHASE LAND—ACTION BY PURCHASERS FOR RESCISSION—LACHES AND ACQUIESCENCE—DISMISSAL OF ACTION—COSTS.

White v. Belleperche, 15 O.W.N. 28.

FRAUD AND MISREPRESENTATION—AGREEMENT TO PURCHASE INTEREST IN LAND—MATERIAL MISREPRESENTATION BY VENDOR—EQUITY OF PURCHASER TO RESCIND AGREEMENT—ASSIGNMENT OF AGREEMENT BY VENDOR TO THIRD PERSON—CHOSE IN ACTION—ASSIGNMENT SUBJECT TO EQUITY—DEFENCE TO ACTION BY ASSIGNEE ON AGREEMENT—COSTS.

London and Western Canada Investment Co. v. Dolph, 15 O.W.N. 37, 43 O.L.R. 449.

(§ I E—28)—FAILURE TO PAY PURCHASE MONEY—VENDOR'S RIGHT.

A stipulation in a deed of sale or promise of sale of land that if the buyer fails to make any payment in capital or interest at the specified dates such deed shall become null and void ipso facto without mise en demeure, is exclusively in the interest of the vendor, who has the right on default to choose between rescission or performance of the contract.

Gagnon v. Lemay, 42 D.L.R. 161, 56 Can. S.C.R. 365, affirming 27 Que. K.B. 59. [Appeal to Privy Council refused.]

TENDER OF PAYMENT—BROKER—INTENTION TO RESCIND.

Where the vendor of land is out of the country and there is no place mentioned in the agreement of sale at which the deferred payments are to be made, the purchaser is justified in tendering the purchase money to the agent who listed the property and who has been held out as the vendor's agent. An assent by the purchaser to the request of such agent to wait for some time before making payment in order that the transfer may be received from the vendor is not an agreement to extend the time nor evidence of an intention not to rescind, although time is stated to be of the essence of the agreement.

Simson v. Young, 41 D.L.R. 258, 56 Can. S.C.R. 388, [1918] 2 W.W.R. 62, reversing 33 D.L.R. 220, 10 A.L.R. 310.

II. Vendor's lien; foreclosure.

(§ II—31)—PROMISSORY NOTE FOR UNPAID PURCHASE PRICE.

Where a promissory note for the unpaid purchase price of lands sold is given, not to the vendor, but to the wife of the vendor, assuming that the note is the property of the wife, the vendor's lien passes with the note to the wife.

Graham v. Crouchman, 39 D.L.R. 284, 41 O.L.R. 22.

(§ II—32)—PURCHASER ASSUMING HYPOTHEC—LIEN DE DROIT—QUEBEC JURISPRUDENCE.

Under Quebec jurisprudence, where a purchaser assumes the obligation to pay the hypothecary creditor any sum of money which may be due him on the property purchased, the creditor can at any time accept that obligation and establish a direct lien de droit against such purchaser as a personal debtor to pay the money.

Archambeault v. Lapierre and Owens, 43 D.L.R. 42, 54 Que. S.C. 266.

(§ II—33)—AGREEMENT FOR SALE OF LANDS—ASSIGNMENT—DEFAULT IN PAYMENT—JUDGMENT—FORECLOSURE — POWERS OF LOCAL MASTER.

De Visscher v. Weir, 40 D.L.R. 757, 11 S.L.R. 180, [1918] 2 W.W.R. 399.

EFFECT OF TAX-SALE—LIEN AGAINST PROCEEDS.

Where land which has been transferred, but not paid for, is sold for taxes, the unpaid vendor has a lien upon the proceeds in excess of the amount required for taxes. An unpaid vendor's lien is an interest in the property, and it is not so much a question of the lien attaching to the proceeds of a sale thereof as of the unpaid vendor being directly entitled to them as being the real owner of the property (per Stuart, J.).

Hetu v. Morinville Oil City Land Co., 13 A.L.R. 115, [1918] 1 W.W.R. 666.

III. Rights of parties as to third persons; bonâ fide purchasers.

(§ III—39)—AGREEMENT TO PURCHASE LANDS—DEFAULT IN PAYMENTS—ASSIGNMENT BY PURCHASER—RIGHTS OF PARTIES.

Fidelity Trust Co. v. Hall, 40 D.L.R. 752, 11 S.L.R. 177, [1918] 2 W.W.R. 439.

ACTION FOR PURCHASE PRICE—NOVATION.

In an action by a vendor to recover the balance of the purchase price due under an agreement for the sale of land, held (per Macdonald, C.J.A., Martin, Galliher and Eberts, JJ.A., McPhillips, J.A., dissenting) that the evidence established a novation by the acceptance of one M. as the plaintiff's debtor in place of the defendant.

Hoag v. Kloepfer (B.C.), [1918] 3 W.W.R. 633.

VENUE.

See also Courts.

MARRIAGE CONTRACT—PLACE OF MARRIAGE.

A personal action based upon a marriage contract passed in one district and followed by the celebration of the marriage in another district may be brought before a Court of the place where the contract was made.

Dufresne v. Dufresne, 27 Que. K.B. 297., affirming 19 Que. P.R. 260.

JURISDICTION—PLACE OF CONTRACT—CORRESPONDENCE—SALE.

A contract of sale by correspondence is consummated at the place where the offer is accepted, namely, where the letter accepting the offer is put in the post office; and it is the Court of the latter place that has jurisdiction in litigation arising therefrom.

Laferte v. Martel, 24 Rev. Leg. 267.

VERDICT.

See Trial; Review of, see Appeal; New Trial.

VESSELS.

See Shipping; Collision; Admiralty.

VOLUNTEERS AND RESERVISTS.

Enlistment, desertion, see Moratorium; Military Law; Militia.

VOTERS.

See Elections.

WAGES.

See Master and Servant, I.
Liability of directors for, see Companies.
Seamen's wages, see Seamen.
Garnishment of, see Garnishment.

Annotation.

Right to; earned, but not payable, when: 8 D.L.R. 382.

WAIVER.

See Estoppel; Contracts; Insurance; Vendor and Purchaser; Sales.

Annotation.

Waiver of forfeiture of lease: 10 D.L.R. 603.

WAR.

See Military Law.
Prize and capture, see Prize Court.
Effect on aliens, see Aliens.
Postponement of payments because war, see Moratorium.
War Relief Act, Volunteers and Reservists Relief Act, see Moratorium.

Annotations.

Status of aliens during war: 23 D.L.R. 357.

Moratorium; Postponement of Payments Acts, their construction and application: 22 D.L.R. 865.

WAR RELIEF ACT.

See Moratorium.

WARRANT.

See Arrest; Criminal Law; Intoxicating Liquors.

WARRANTY.

See Sale; Vendor and Purchaser.

PERSONAL ACTION — REAL WARRANTY — NULLITY OF DEED.

When the principal plaintiff takes a personal action for a sum of money, balance of the price of a sale of an immovable, and the defendant calls in his warrantors in warranty, the latter cannot sue their remote warrantors in warranty, as by art. 187, C.P., this is only permitted in case of real warranty. In a suit of titles creating a successive warranty, if one of the deeds is annulled by the Court, no recourse in warranty can be had against any of the subsequent warrantors.

Strachan v. Taylor, 54 Que. S.C. 93.

COMPANY DIRECTORS — SURETIES — DIVIDENDS — INSOLVENCY — JOINDER — CONCLUSIONS.

There may be an incidental demand in warranty, when a principal action is taken against the surety of a joint stock company, and the action in warranty is taken by that surety against one of its directors who has become liable for the company's debts under the Dominion Companies Act, for having declared a dividend when the company was insolvent. In an action in warranty, several co-sureties and the principal debtor may be joined provided the conclusions are separated and distinct.

Dupuis v. Bissonnette, 27 Que. K.B. 149.

MOTION TO EXTEND — DEPOSIT.

A motion to extend the delay for calling in warranty, after the delays fixed by art. 164, C.C.P. (Que.), without being accompanied by the deposit required, is not a dilatory exception and has not the effect of suspending the delays for pleading.

Universal Wardrobe Repair v. Berman Dye Works, 19 Que. P.R. 391.

HYPOTHECARY ACTION—PARTIES.

A defendant, sued jointly and severally with other subsequent owners of a property mortgaged by the hypothecary creditor who, after having had the property sold in an hypothecary action, has not been paid in full of his claim, may, by way of dilatory exception, ask to call in warranty the previous owner, as co-defendant in the suit, if the latter has, in his deed of purchase, bound himself to pay the amount of the obligation.

Mousley v. Trudel, 19 Que. P.R. 145.

DECLINATORY EXCEPTION — DOMICILE — PLACE OF CONTRACT.

A defendant in an action in warranty taken against him in the district of Beauce, and based on a contract which he had made in Montreal with the principal defendant, cannot plead declinatory exception, claiming (1) that he is domiciled in the province of Ontario where the action in warranty was served on him; (2) that the cause of action in warranty arose in the district of Montreal. Under art. 98, C.C.P., a defendant in an action in warranty, wheresoever his domicile may be, should be summoned before the Court of the place where the principal action was brought.

Vachon v. Montreal Abattoirs, 20 Que. P.R. 174.

SURETY—DILATORY EXCEPTION.

A surety, jointly and severally liable, may, by dilatory exception, stay the principal action to call the debtor in warranty.

Eugene Julien & Cie v. Marchand, 20 Que. P.R. 266.

WATERS.

I. PUBLIC RIGHTS; RIGHTS BETWEEN PUBLIC AND INDIVIDUAL.
- A. What are public or navigable.
- B. Relative rights as between province and Dominion.
- C. Relative rights of public and individuals.

II. WATER RIGHTS AND EASEMENTS AS BETWEEN INDIVIDUALS.
- A. Riparian or littoral rights in general; what are watercourses.
- B. Accretions; alluvion; islands; flats.
- C. Use of water; interference with flow.
- D. Obstructions; overflow; raising dams.
- E. Pollution.
- F. Prior appropriation.
- G. Surface and seepage water.
- H. Subterranean waters; springs; wells.
- I. Irrigation; ditches; water rights.
- J. Contract or grant.
- K. Adverse use; prescription.

III. WATER SUPPLY.
- A. In general; exclusive privilege.
- B. Operation and regulation of waterworks.

As to drainage, see Drains and Sewers; Municipal Corporations.

Admiralty jurisdiction over, see Admiralty; Shipping; Collision.

Annotations.

Natural watercourse; drainage; cost of work; power of referee: 21 D.L.R. 286.

"Harbours" within property clauses of B.N.A. Act: 26 D.L.R. 69.

Public right of fishing in tidal waters; the 3 mile limit: 35 D.L.R. 28.

I. Public rights; rights between public and individual.

A. WHAT ARE PUBLIC OR NAVIGABLE.

(§ I A—5) — RIGHTS OF NAVIGATION — ACCESS TO SHORE — INTERFERENCE WITH — COMPENSATION — FALSE CREEK TERMINALS ACT — NAVIGABLE WATERS PROTECTION ACT.

Any interference with a public right of navigation is a nuisance which the Court can order abated, notwithstanding any approval thereof by the governor-in-council under sec. 7 of the Navigable Waters Protection Act (per Fitzpatrick, C.J.). The powers given the City of Vancouver by the False Creek Terminals Act, ch. 76, 1913 (B.C.S.), of erecting a sea-wall, etc., in False Creek, cannot be carried out to the prejudice of rights of access from the creek to private property on the shore thereof, because the Dominion Parliament, which has exclusive legislative authority over navigation, has not authorized the construction of such works. (Per Fitzpatrick, C.J.) The exercise of such powers is subject to the rule laid down in Saunby v. City of London, [1906] A.C. 110, that a public body with compulsory powers of appropriating a person's land or water rights or of acquiring some easement over his property cannot take land or interfere with the free use by the owner of his property without giving to the landowner notice to treat for some definite subject-matter. On failure by such body to comply with such conditions an owner whose property has been injuriously affected retains his ordinary right of action for trespass, and where the damages are of a substantial character, is entitled to an injunction. In such a case there is no discretion in the Court to award damages only in lieu of injunction. (Per Idington and Duff, JJ.) Davies and Anglin, JJ., dissented on the ground that the legislature did not expressly require the city to make compensation, and the case was indistinguishable from East Fremantle Corporation v. Annois, [1902] A.C. 213.

Champion & White v. City of Vancouver (Can.), [1918] 1 W.W.R. 216, reversing 31 D.L.R. 22.

C. RELATIVE RIGHTS OF PUBLIC AND INDIVIDUALS.

(§ I C—30) — NAVIGABLE RIVER — SHORE — LICENSE TO CROSS—OBSTRUCTIONS.

The bed of a navigable river not tributary to the sea, whose waters rise or fall according to the season, extends to the line of ordinary high water, without taking count of floods, belongs to the Crown. Accordingly, where a person has obtained from the Dominion Government a license giving him the right to cross a navigable river, the owner of real property abutting on the shore of such river has not the right to prevent such person from exercising his rights, under the pretext that the shore consists only in a certain fall of the river between mean water and the low water of summer.

Cousineau v. Séguin, 54 Que. S.C. 447.

BEACH — RIGHT OF CUTTING SEAWEED.

Beaches are part of the Crown domain; they only pass into the possession of individuals by virtue of express grants, and cannot be alienated by implication. The right to cut seaweed upon the beaches is, like the right to fish, only an accessory to the property. It belongs to the Crown first, then to the Seigneur who has obtained an express grant, or to those who are in right of the seigneur. On the south shore of the river St. Lawrence, below Quebec, the right to cut seaweed upon the beaches remaining in the Crown domain belongs to the owners of the river bank, under R.S.Q. art. 7308.

Morency v. Leblond, 54 Que. S.C. 97, 24 Rev. de Jur. 509.

(§ I C—35) — HIGH WATER MARK — RIPARIAN RIGHTS — ACCESS — DAMAGES FOR OBSTRUCTION.

High-water mark in British Columbia, at

a place in respect to which there is no record of tides extending over at least a year, should be determined by the "visible high-water mark," i.e., the point fixed by the signs on the ground, such as the state of vegetation and the accumulation of debris. [Att'y-Gen'l v. Chambers, 4 De G. M. & G. 206, Plumb v. McGannon, 32 U.C.R. 8 at 14 and U.S. cases discussed]. The owners of land adjoining the sea are entitled to free access to, and ingress from, the sea; this right is a private one, distinct from the public right of fishery or navigation, and there is no distinction between the rights of riparian owners on a tidal river and the sea. The occupant of such land is entitled to damages, even as against the Crown, where such private right of access to the sea has been invaded by an obstruction. [Atty'-Gen'l of Straits Settlement v. Wemyss (1888), 13 App. Cas. 192; North Shore R. Co. v. Pion (1889), 14 App. Cas. 612, followed.]

Nelson v. Pacific Great Eastern R. Co., [1918] 1 W.W.R. 597, 25 B.C.R. 259. [See [1918] 3 W.W.R. 85.]

(§ I C—52) — Obstructing navigation — Bridge—Actionability.

The construction of a low level bridge across a navigable river, without providing necessary facilities for navigation, does not give rise to an action for wrongful obstruction to navigation, if, in fact, the bridge is not the real cause of non-user of the river for navigation.

Grand Trunk Pacific R. Co. v. B.C. Express Co., 38 D.L.R. 29, 55 Can. S.C.R. 328, reversing 27 D.L.R. 497. [Affirmed by Privy Council, 44 D.L.R. 1.]

Navigation — Wharf — Trespasser — Nuisance.

A trespasser taking possession of the foreshore of a navigable river and building a whar thereonf cannot maintain an action for damages against the Crown for erecting a retaining wall in the interests of navigation and to protect the shore from erosion.

Noel v. The King, 38 D.L.R. 664, 16 Can. Ex. 259.

(§ I C—55) — Possession of lands inundated.

In a possessory action a Court should only examine the facts from the point of view of the possession claimed by the plaintiff, and of the material difficulty of such possession of which he complains. The periodical inundations which result from the use of the waters of a stream, and of navigable or floatable rivers, has not the effect of making fall into the public domain the parts of the inundated lands which belong to owners of the river banks. When such lands again become exposed by the subsidence of the water, even when their surface has suffered changes, if they have not become a new bed for the overflowed river, they continue to belong to the original owner of the river bank, who is deemed to have always retained the possession and ownership.

Traversy v. Bibeau, 24 Rev. de Jur. 238.

II. Water rights and easements as between individuals.

C. Use of water; interference with flow.

(§ II C—80) — Draining — Rights of lower proprietor — Damages.

In an action for damages because of the flooding of the plaintiff's land by water from a ditch alleged to have been dug by the defendant, the trial Judge found that an agreement was made between the defendant company and B., the owner of land from which the water flowed on to plaintiff's land, that B. constructed the ditch for the price agreed upon, which was paid by the company, and that the result of the construction of the ditch was to increase the natural flow of water. The trial Judge awarded the plaintiff damages, but on appeal his judgment was reversed on the ground that the plaintiff had failed to establish responsibility in the defendant for the construction of the ditch in such a way as to cause damage. The plaintiff appealed. Held, per Fitzpatrick, C.J., Idington, Anglin and Brodeur, JJ., Davies, J., dissenting, that the appeals should be allowed and the trial Judge's judgment restored.

McCord v. Alberta and Great Waterways R. Co. (Can.), [1918] 3 W.W.R. 622, reversing 41 D.L.R. 722, [1918] 2 W.W.R. 708, 13 A.L.R. 476.

D. Obstructions; overflow; raising dams.

(§ II D—95) — Lumbermen — Riparian rights — Obstructions.

Lumbermen and riparian proprietors have concurrent rights in a floatable river. The lumbermen have an undoubted right for passage of their logs down the river, but this right must be exercised subject to the rights of the riparian proprietors, and all reasonable means must be used and care and skill taken to avoid injury to the riparian owners.

Nashwaak Pulp & Paper Co. v. Wade (N.B.), 43 D.L.R. 141.

Floatation of logs — Damage — Fault.

Persons using a river for floating logs are obliged to take every necessary and advisable precaution that damages shall not be done to the proprietors on the banks of the streams. Therefore, if these logs caused damages to the flume of a mill on the bank of the river, on account of no glancing boom having been constructed to prevent the logs from going into a bay leading to the flume, the persons so floating the logs are responsible for the damages, as such glancing boom, although not necessary to the purposes of the mill owner, was an obvious precaution on the part of the proprietor of the logs and should have been built by him.

Alie v. Gilmour, 24 Rev. Leg. 187.

Dam — Injury to upper occupants — Overflow — Excessive rainfall — Act of God — Possession — Power company — Charter — Damages.

It is the duty of any one who interferes

with the course of a stream to see that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by extraordinary rainfall, and if damage results from the deficiency of the substitute which he has provided for the natural channel he will be liable. [Greenock Corporation v. Caledonian R. Co., [1917] A.C. 556, followed.] By means of a dam constructed and operated by one of the defendant companies on the Rainy river at Fort Frances, the waters of the river and of Rainy lake were retained and stored for the defendants' purposes. In the winter and early spring of 1916, a large quantity of water was thus stored; and, when the spring floods came, the level of the lake was raised to an immoderate degree. There were unusually heavy rainfalls in the summer of 1916; and the waters above the dam were then so accumulated as to back up and overflow upon the premises of the several plaintiffs, situated above the dam, causing damage for which they brought this action:—Held, upon the evidence, that, while the abnormally high water in the lake in the spring and summer of 1916 was not due solely to the defendants or to those controlling the dam, there were in the early part of the year, to the knowledge of those operating the dam, indications that the water-level would be high, and the probabilities of danger were increased by the positive actions of those operating the dam: (1) in holding back and storing immense quantities of water, filling up what would otherwise have been a receptacle for a like quantity of water produced by the spring freshets or excessive rainfall; and (2) in their persistent refusal and neglect to open the sluice-gates and waste-ways of the dam, which, if opened, would have drawn down large quantities of water. The events which happened when the plaintiffs suffered the damage were not attributable to the act of God so as to relieve those who controlled and operated the dam. Certain of the plaintiffs were not the owners, but merely the occupants, of portions of the lands damaged, but their possession was sufficient to enable them to maintain the action. The Ontario company defendant had no right, by virtue of its charter of incorporation or its agreement with the Government of Ontario or otherwise, to back up the water to the extent to which it was backed in 1916, nor was it privileged to disregard the rights of owners or occupants above the dam. The action was brought against a Minnesota company as well as the Ontario company, but the latter only was found to be liable to the plaintiffs. The damages of each plaintiff were separately assessed by the trial Judge.

Smith v. Ontario and Minnesota Power Co., 42 O.L.R. 167, varied in 15 O.W.N. 116.

DAM ERECTED IN RIVER — INJURY TO LAND BY FLOODING — LIABILITY OF COMPANY CONTROLLING AND OPERATING DAM — DAMAGES — COSTS.

Girton v. Ontario and Minnesota Power Co Limited, 13 O.W.N. 446.

SPRING — DRAIN INCREASING FLOW — DAMAGES.

Where the natural flow of water across land is increased artificially by an adjoining proprietor the latter is liable for the damage caused his neighbour's land by such increased flow. [McCord v. Alberta & G. W. R. Co., [1918] 3 W.W.R. 622, followed.]

Molden v. Kirkeby and Keehn (Alta.), [1918] 3 W.W.R. 1014.

FILLING IN OF FORESHORE — OBSTRUCTION TO NAVIGATION.

Neither the Navigable Waters' Protection Act, R.S.C. 1906, ch. 115, as a whole, nor sec. 20 thereof in particular appears to be aimed at preventing the filling in by a riparian owner of the foreshore in front of his property. The filling of False Creek did not create a nuisance or an illegal obstruction to navigation within the meaning of sec. 7, the Navigable Waters Protection Act, R.S.C., 1906, ch. 115 [interpretation of Duff, J., in Cunard v. The King, 43 Can. S.C.R. 88, followed.] A tenant of a lessee of the C.P.R. is not entitled to question the right of possession claimed by the company and under which the tenant received his lease, unless he can invoke successfully the illegality of the lease to the C.P.R. In this case the burden was held to be upon the tenant of shewing that the land, the subject-matter of the lease, was so tainted with illegality as to preclude the Court from directing compliance with any of the terms of the instrument [Gas Light and Coke Co. v. Turner, 6 Bing. N.C. 234, distinguished], and this burden he was held not to have discharged.

Woods v. Opsal (B.C.), [1918] 1 W.W.R. 985.

OBSTRUCTION — DIVERSION — MUNICIPAL POWERS.

When, by a depression of ground, a piece of soil spreads, in a natural way, its surface waters over neighbouring soil, the latter is, for this purpose, inferior soil to the other, and must receive the surface water which runs over it without the need of considering if the ditch which follows the bed of the said depression of ground has been dug or not, or if it runs continuously or only intermittently. The owner of the inferior soil cannot obstruct the course of the water so as to inundate the other soil. Municipal authorities have not the right to change by their by-laws natural servitudes established by law.

Vidal v. Mercier, 53 Que. S.C. 24.

PROCES VERBAL — PUBLIC OFFICER — MUNICIPALITY.

Where a water course, in a proces verbal of which the defendant complained, has existed for 50 years, and the defendant constantly recognized the obligation of its maintenance by contributing to it, and had committed acts of violence towards an officer of a municipal corporation whose duty it was to carry out the provisions of the proces verbal, the defendant was ordered, within a time named, to open and clear the water

course by removing an obstruction which he had placed there.

La Corporation de la Paroisse de St. David v. Sevigny, 24 Rev. de Jur. 295.

G. Surface and seepage water.

(§ II G—125)—Slough — Obstruction — Beaver dam.

An obstruction to the natural flow of a slough or surface water, by a beaver dam, may be rightfully removed by anyone interested, in order to restore the land to its original and natural conformation, unless another party, relying on the continuance of the obstruction, had dealt with his land in such way that he would be injured by the removal of the obstruction. [Makowecki v. Yackimyc, 34 D.L.R. 130, 10 A.L.R. 366, applied; see McCord v. Alberta & Great Waterways (Alta.), 37 D.L.R. 13.]

Farnell v. Parks, 38 D.L.R. 17, 13 A.L.R. 7.

III. Water supply.

See Municipal Corporations.

WHARVES.

§ I—3) — Defective supporting piles — Collapse — Damage to cargo — Liability.

A warehouseman is a bailee for hire of goods stored in his warehouse and as such must use reasonable care to keep his premises in a safe condition. The collapse of a wharf due to the supporting piles becoming worm-eaten and unable to support the superstructure, when reasonable care would have discovered the defects, renders the owner liable for resulting damage.

Furness, Withy & Co. v. Ahlin, 42 D.L.R. 97, 56 Can. S.C.R. 553, affirming 35 D.L.R. 150, 51 N.S.R. 291.

WILLS.

I. The instrument; form; requisites; validity.
- A. In general.
- B. Execution; attestation.
- C. Revocation; reviving.
- D. Who may make; capacity; undue influence.
- DD. What may be disposed of.
- E. Probate; contest; foreign wills.
- F. Codicil.

II. Nuncupative; holographic.

III. Devise and legacy.
- A. Construction generally; implied gift.
- B. Description of beneficiaries; who may take.
- C. Children not mentioned or disinherited.
- D. Charitable bequest or devise; restrictions.
- E. What property passes.
- F. Partial intestacy.
- G. Nature of estate or interest created.
- H. Enjoyment; payment.
- I. Election; acceptance.
- J. Equitable conversion.
- K. Charge upon donee or land devised.
- L. Lapsing; redemption; deduction; revocation, renunciation.
- M. Division of residue; inconsistent clauses.

IV. Suit to construe or reform.

See also Executors and Administrators; Descent and Distribution.

Succession duties, see Taxes, V.

Annotations.

Ambiguous or inaccurate description of beneficiary: 8 D.L.R. 96.

Substitutional legacies; variation of original distributive scheme by codicil: 1 D.L.R. 472.

Effect of war on appointment of executors or administrators for benefit of alien enemies: 23 D.L.R. 375, 380.

Estates for life: 31 D.L.R. 390.

I. The instrument; form; requisites; validity.

A. In general.

(§ I A—15) — Two testamentary documents executed by testatrix in existence at death — Alterations made in earlier document after execution without re-execution — Reference in later document to earlier document — "If the stroked one stands take it" — Later document alone admitted to probate.

Grant v. Grant, 15 O.W.N. 167.

B. Execution; attestation.

(§ I B—20) — Authentic form — Reading of will—Notary.

A will in authentic form, in which it is not declared that the will was read "by the notary," is void. Proof by testimony is illegal for proving that it was read to him by the notary.

Beauchamp v. Patenaude, 53 Que. S.C. 276, 24 Rev. de Jur. 143.

(§ I B—23) — Signature of witnesses — Statements of testator.

Statements made by a testator some time before the making of his will cannot prevail against the express terms of the document containing his last will. Witnesses to a will, made in English form, may witness and sign the will in a room adjoining that where the testator is, provided the latter can see them through the open door.

Langlois v. Morin, 24 Rev. Leg. 362.

C. Revocation; reviving.

(§ I C—30) — Revocation — Will of soldier in military form.

A subsequent testamentary paper does not necessarily revoke one prior in date, even though the second instrument contains a general revocatory clause. The intention of the testator is the sole guide in the matter, and the intention to be discovered is that relating to the disposition of the testator's property and not to the form of the will. Moreover, a will is not necessarily confined

to one document, but may be contained in several documents. [Lemage v. Goodban (1865), L.R. 1 P. 57, at p. 62; Gladstone v. Tempest (1840), 2 Curteis, 650; Dempsey v. Lawson (1877), 2 P.D. 98 at p. 107, followed.] A will executed by a soldier after it had been prepared by his solicitor held not to have been revoked by a will made three days later, on a form supplied by the military authorities, which contained a clause revoking generally all former wills. The disposition of the property was the same in both wills and both documents were admitted to probate.

Re Erskine Estate (Alta.), [1918] 1 W.W.R. 249.

Application for probate of a will refused, and letters of administration with will annexed granted of a will, made on a form prescribed by the military authorities and while the testator was on active service, which purported to revoke all former wills and to be the testator's last will, but made no mention of an executor, there being no blank therefor. [Erskine Estate, [1918] 1 W.W.R. 249, referred to; Lemage v. Goodban, L.R. 1 P. 57, followed.]

Re Daigle Estate (Alta.), [1918] 2 W.W.R. 910.

D. Who may make; capacity; undue influence.

(§ I D—35) — Burden of proving genuineness.

If it be shewn that a party taking a benefit under a will, himself wrote that will, or participated in the preparation of it, or in the procuring of its execution, the law casts upon such beneficiary, in proving the will, the additional burden of proving that the testator knew and approved of the contents of the will; the rule of law being that, under such circumstances, a suspicion is cast on the will which must be removed by testimony which leaves no reasonable doubt of the genuineness of the will as the last free act of the testator. Each case must be decided upon its own peculiar circumstances, and it is for the jury to consider all the surrounding facts and circumstances, and decide whether or not they are such as to justify the conclusion that the testator had been influenced to such an extent as to have lost the power of free agency.

Farnell v. Conway, 41 D.L.R. 649, 45 N.B.R. 343.

Undue influence — Conspiracy — Attesting witnesses—Appeal—Costs.

In an action to establish a will made about a month before the death of the testator, leaving all his property to his wife, whom he had married about 8 months earlier, it was held, by Clute, J., the trial Judge, that the attempt of the defendant, the sister of the testator, to prove a conspiracy on the part of the plaintiff and her relatives to procure the testator's marriage to her and the making of the will in her favour, failed upon the evidence, as also the attempt to shew that the will was not duly executed, that the testator had not testamentary capacity, and that the making of the will was procured by undue influence. The trial Judge ordered that the will should be admitted to probate and that the defendant should pay the costs of the litigation. The witnesses to the execution of the will were the plaintiff's brother and another person. The former testified at the trial, but the latter was not called as a witness by either party, although the trial Judge pointed out that he should be called and gave the parties opportunities of calling him after the close of the evidence. The defendant appealed from the judgment at the trial, and the appellate Court, after hearing counsel, deferred the disposition of the appeal until the evidence of this person had been taken. Upon his evidence, when taken, added to the evidence taken at the trial, the Court was of opinion that the judgment of the trial Judge could not be disturbed. Held, that the circumstances of the case made it one of those in which the conscience of the Court should not be satisfied as to the validity of the will until all available evidence, material to the issues between the parties, had been adduced and the plaintiff's claim well-proved. Held, also, varying the judgment below, that the defendant's costs of the litigation and of the appeal should be paid out of the estate of the testator.

Newcombe v. Evans, 43 O.L.R. 1. [See 37 O.L.R. 354, 31 D.L.R. 315, 15 O.W.N. 318.]

Undue influence—Relations — Presumption.

The plaintiff, a sister of E. S., an elderly spinster, who died in April, 1916, brought this action against J. L., another sister, and against the children of J. L., to set aside, on the grounds of want of consideration, the mental incapacity of E. S., and the undue influence of the defendants, a voluntary conveyance of land made to the defendant D. B. L. in 1911, and two gifts of money made respectively to the defendants M. L. and J. L. in 1915. The defendants, in their statement of defence, upheld the conveyance and gifts, and also set up, as the last will and testament of E. S., a testamentary writing executed by her in July, 1913, whereby she devised all her real estate to the defendant D. B. L. and bequeathed her personal property to the defendants. The plaintiff, in reply, attacked the will, upon the same or similar grounds. The will had not been proved. Pending the action, the plaintiff was appointed administratrix of the estate of E. S. and added as a party in that capacity:— Held, upon the evidence as to the relative positions of the deceased and the three defendants, and considering the mental and physical conditions and surroundings of the deceased, that the defendants had it in their power to exercise a great influence over the deceased, and that the three gifts attacked were obtained when the defendants occupied that position of influence; these transac-

tions, therefore, fell within the rule that where the donee is in a position of confidence or in a position to exercise influence over the donor, it is not necessary to the setting aside of the gift, on the ground of undue influence, that there should be proof of its exercise; undue influence is presumed, and it is for the donee to rebut the presumption; and in this case the defendants had not only failed to rebut the presumption, but had against them the finding of the trial Judge that undue influence was in fact exercised, and that these gifts were the result. Therefore, the gifts could not stand. [Delong v. Mumford (1878), 25 Gr. 586; Vanzant v. Coates (1917), 37 D.L.R. 471, 39 D.L.R. 485, followed.] Held, as to the will, that, although (1) mental capacity and (2) due execution were shewn, it was not shewn (3) that the document propounded was understood and appreciated by the testatrix, and was in truth and fact the expression of her desire; and these three things must be shewn before the rule laid down in Baudains v. Richardson, [1906] A.C. 169, 185, that those attacking the will must shew coercion or fraud, can be applied. The defendants were in the position of influence; the will was prepared on their instructions, in their presence, and for their benefit; the solicitor who prepared the will—the only independent witness called to support it—did not satisfy himself thoroughly as to the volition and capacity of the testatrix; the circumstances in which the will was prepared and signed were such as to cause grave suspicion, which had not been removed by the evidence; and the trial Judge had found that the evidence of undue influence was overwhelming. The defendants had, therefore, failed to establish the will. [Review of the authorities. Tyrrell v. Painton, [1894] P. 151, 157; Murphy v. Lamphier (1914), 31 O.L.R. 287, 319, specially referred to. Judgment of Kelly, J., affirmed.]

Wannamaker v. Livingston, 43 O.L.R. 243.

TESTAMENTARY CAPACITY — UNDUE INFLUENCE — CIRCUMSTANCES SURROUNDING PREPARATION AND EXECUTION OF DOCUMENT PROPOUNDED AS WILL — SUSPICION — EVIDENCE — ONUS — NEW TRIAL.

Sellers v. Sullivan, 15 O.W.N. 65.

ACTION TO SET ASIDE LETTERS PROBATE — ONUS — EVIDENCE — TESTAMENTARY CAPACITY — UNDUE INFLUENCE — FINDING OF TRIAL JUDGE — REVERSAL ON APPEAL.

Gallagher v. Woodman, 15 O.W.N. 157.

DEVISE OF LAND — CONVEYANCE BY DEED — ACTION TO SET ASIDE — MENTAL INCAPACITY OF TESTATOR AND GRANTOR — UNDUE INFLUENCE — EVIDENCE — TITLE BY POSSESSION TO PORTION OF LANDS OF TESTATOR ACQUIRED BY SON — EVIDENCE — LIMITATIONS ACT — ADVERSE ENTRY — FINDINGS OF TRIAL JUDGE — APPEAL.

Goodchild v. Wilcox, 14 O.W.N. 125, affirming 12 O.W.N. 55.

(§ I D—37)—DELUSIONS.

To be capable of making a valid will, a testator must have the normal exercise of his thoughts, possess all his intellectual and moral faculties, have entire freedom of his affections, and a will free from all influence and capable of making a choice of his heirs. Where one for a long time lived in constant fear of being poisoned, and had hallucinations about it, he is incapable of disposing of his property by will. A party proceeding to attack an instrument may ask, by exception, not only for the nullity of a deed opposed to him, but also the nullity of a deed invoked against him as proof of a right.

Robert v. Robert, 24 Rev. Leg. 136.

E. PROBATE; CONTEST; FOREIGN WILLS.

(§ I E—40) — PERSONS INTERESTED — NON-APPEARANCE.

Persons interested in a will having been cited to appear and shew cause why a previous will should not be admitted to probate, and having failed to appear, the Court is at liberty to grant probate, or administration with will annexed, of such previous will.

Re Robinson, 40 D.L.R. 664, 11 S.L.R. 188, [1918] 2 W.W.R. 391.

APPLICATION FOR PROBATE — DELEGATION BY EXECUTOR TO ATTORNEY — AFFIDAVIT OF ATTORNEY — SUFFICIENCY — EXECUTION OF TRUSTS (WAR FACILITIES) ACT, CH. 68, 1916.

Re Benson (B.C.), [1918] 3 W.W.R. 583.

ACTION TO SET ASIDE — PARTIES — HUSBAND AND WIFE.

An exception to form presupposes some defect and not an absence of interest, which goes to the merits. An heir has an interest on asking to set aside a will which disinherits him, even if there is another will which also disinherits him, particularly if the latter is to the benefit of another legatee. An action to set aside a will should be directed against the husband and wife common as to goods, if the estate under the will is partly of movables and partly of immovables. If such an action has only been directed against the wife authorized by her husband, the plaintiff may obtain a delay to add the husband personally.

Lapierre v. Lapierre, 20 Que. P.R. 137.

APPOINTMENT OF SEQUESTRATOR.

There is litigation of a decedent's estate, when the will of the latter is attacked before the Court; under such circumstances a sequestrator may be appointed.

Evans v. Slayton, 54 Que. S.C. 518.

(§ I E—53) — SETTLEMENT OF ACCOUNTS — CONTEST — FINDING OF SURROGATE JUDGE — REFERENCE TO REGISTRAR TO COMPLETE — APPEAL — NOTICE TO DISMISS — BONDS FOR COSTS — SURETIES —APPROVAL OF BY REGISTRAR.

Re Estate of Craig (N.S.), 43 D.L.R. 762.

F. CODICIL.

(§ I F—60)—REVOCATION OF BEQUEST.

A codicil setting out the testator's life insurance policies and providing that "one-quarter of these policies go direct to my wife, but all my other property now goes, with my last son dead, to my three daughters under the terms of my said last will" revokes a bequest in the will to the testator's wife of half the residue of his estate.

Brodie v. Chipman, 43 D.L.R. 593, 57 Can. S.C.R. 321, reversing 41 O.L.R. 281, sub nom Re Spink.

II. Nuncupative; holographic.

(§ II—65) — HOLOGRAPHIC — SIGNATURE.

A holographic will is valid even if the signature is not at the end of the will, and the law is fulfilled if the testator's name comes after the constitutive clauses of the will.

Ex parte Cunningham, 20 Que. P.R. 236.

III. Devise and legacy.

A. CONSTRUCTION GENERALLY; IMPLIED GIFT.

(§ III A—70) — LEGACY — VAGUENESS — LAPSING — RESIDUE.

A bequest of $50,000 to be "held as a fund towards helping to supply such institutions as may in the near future be demonstrated to shew that God's people are willing to help others to see the light that is so real, near and universal for all who will receive. These institutions may take the place of what are at present called hospitals, poor houses, gaols and penitentiaries, or any place that is maintained for the uplifting of humanity," is so vague and impracticable, and indefinite, that it raises no trust which could be carried out and such sum must fall into the residue of the estate.

Re Orr; Cameron v. Church of Christ, Scientist, 43 D.L.R. 668, 57 S.C.R. 298, reversing 40 O.L.R. 567. [Leave to appeal to Privy Council refused.]

MILITARY WILL REVOKED BY LETTERS.

In arriving at a conclusion as to a will of a deceased person to be gathered from various documents admitted, the Court must have in view the real intention of the testator and must gather it from the documents presented. If in the series of testamentary documents the Court finds one which has been wholly and completely revoked by the provisions of a succeeding will, the one so revoked will not be admitted to probate because it has no part to play in the devolution of the estate. Letters written by a soldier on active service, which furnish conclusive evidence that he considered a prior will in force, and shewing that he considered a subsequent military will which is inconsistent with it as repudiated, are sufficient to revoke such military will.

Re McNeil, 42 D.L.R. 449, 45 N.B.R. 479.

LIFE ESTATE — IMPLIED POWER OF EXECUTOR.

A will whereby the testator left to his widow all his real and personal property for the term of her natural life or while she remained a widow, held to entitle the widow to a life interest only in the estate, both real and personal, with an implied power in the executor to draw on the capital should the needs of the widow require it.

Re Mika Estate (Sask.), [1918] 1 W.W.R. 888.

DEVISE TO SON — DIRECTION TO SON TO GIVE WIDOW AND FAMILY HOME WITH HIM — PERSONAL OBLIGATION, NOT ESTATE IN LAND DEVISED.

Re Killorin, 14 O.W.N. 6.

PROVISION FOR WIDOW, WHETHER IN LIEU OF DOWER — ELECTION BETWEEN DOWER AND BENEFIT UNDER WILL — ALLOWANCE TO WIDOW FOR BOARD AND LODGING — AMOUNT OF — DEVISE SUBJECT TO CHARGE ON LAND — DUTY OF EXECUTOR WHERE DEVISEE FAILS TO ACCEPT OR REJECT DEVISE.

Re McCallum, 14 O.W.N. 111.

ANNUITY TO WIDOW — FIRST CHARGE ON WHOLE ESTATE — PAYMENT OUT OF CORPUS IF INCOME OF ESTATE INSUFFICIENT — OTHER ANNUITIES — ORDER OF PAYMENT — SPECIFIC LEGACY OF LUMP SUM PAYABLE AT DEATH OF WIDOW — INTEREST — DISTRIBUTION OF RESIDUE — ANNUITIES PAYABLE TO HEIRS ON DEATH OF ANNUITANTS IN LIFETIME OF WIDOW.

Re McLean, 14 O.W.N. 137.

DIVISION OF ESTATE — LEGACIES — INTEREST — ISSUE OF LEGATEES — "ACCUMULATION."

Re Hancock, 14 O.W.N. 171.

PAROL EVIDENCE — DOCUMENT LOST OR DESTROYED — SUCCESSION DUTY.

When a document is lost or destroyed, or is in the possession of a third party so that it cannot be produced, without the faults or collusion of the one who invokes it, its contents may be established by parol evidence. A universal legatee in usufruct who is in possession of property bequeathed is personally responsible to the creditors for the payment of succession duties.

Rolland v. Ball and Prefontaine, 27 Que. K.B. 67.

(§ III A—78) — IN FRENCH — AMBIGUITY — ADMISSION OF EXTRINSIC EVIDENCE TO PROVE INTENTION.

Berger v. Clavel, 42 D.L.R. 771, 55 Can. S.C.R. 633, reversing 51 Que. S.C. 165, sub nom Germain v. Clavel.

B. DESCRIPTION OF BENEFICIARIES; WHO MAY TAKE.

(§ III B—80) — DISTRIBUTION OF RESIDUE AMONG MEMBERS OF CLASS OF LEGATEES — "LEGATEES" CONFINED TO PERSONS GIVEN DIRECT PECUNIARY LEGACIES — APPLICATION FOR DETERMINATION OF

QUESTION OF CONSTRUCTION — COSTS — EXECUTORS — BENEFICIARIES.

Re Fulton, 15 O.W.N. 220.

DEVISE OF FARM TO SON FOR LIFE SUBJECT TO CHARGE OF LEGACIES AND ANNUITY TO WIDOW — DEATH OF SON BEFORE PAYMENT OF LEGACIES — SURVIVAL OF WIDOW — RESIDUARY GIFT — SALE OF FARM — DISPOSITION OF PROCEEDS.

Re Smith, 15 O.W.N. 45.

FAITH OF BENEFICIARIES—PUBLIC POLICY.

A codicil to a will, which declares that any of the children of the testator who shall be members of any denomination or church, usually known as baptists or anti-pedo-baptists, or whose doctrine or practice is opposed to the baptism of infants, shall only be entitled to receive one half of his share as institute, substitute or legatee of his estate, and to the whole of his share only by a bonâ fide discontinuation of membership of this denomination or church, is not void as contrary to public order and good morals.

Thorton v. Parker, 54 Que. S.C. 413.

BEQUEST TO WITNESS— NULLITY —INTESTACY.

A legacy to a witness of a will, in English form, is void, but does not affect the other provisions of the will. If such legatee is also made the testamentary executor, under an arrangement by which he accepts a fixed sum in lieu of his legacy and all his rights, such acceptance is not a ratification of the contested provision of the will, and the legacy made to the witness being void, the property illegally given remains in the ab intestat succession of the testator.

Vandette v. Vandette, 24 Rev. Leg. 220.

(§ III B—81) — POWER OF EXECUTOR TO SELL — DIRECTIONS — DISTRIBUTION — BROTHERS AND SISTERS "OR THEIR HEIRS" — BROTHERS OF HALF BLOOD — PER STIRPES.

W., by his will, made in 1861, appointed his wife and two other persons executors. He died in the same year; his wife died in September, 1917; one of the other executors survived her. W. willed and bequeathed to his wife during her natural life the whole of his real and personal property, including his farm, which was the sole property in question upon an application made in 1918, by the surviving executor, under the Trustee Act and the Vendors and Purchasers Act. The will then provided that, if it should be unsuitable for his wife to live on the farm, "she may if she deems it to be for her greater convenience, with the advice and management of my executors dispose of the whole or part of the farm . . . to invest in other property provided always that whether this may be done or not the property belonging to her as coming from me shall at her death be disposed of in any way satisfactory to my executors so that all my brothers and sisters together with all my wife's brothers and sisters or their heirs shall have personally an equal"—here a word seemed to be omitted—"in it share and share alike." The farm, at the date of the death of the wife, remained unsold:—Held, upon the motion above referred to, that the testator had effectively disposed of the fee simple remainder in the farm—there was no intestacy. (2) That the case was not governed by the Devolution of Estates Act, R.S.O. 1914, ch. 119, or dependent upon it; that the property did not vest immediately upon the death of W.; that the will created a trust for sale; and that the executors, under the Trustee Act, R.S.O. 1914, ch. 121, sec. 44, and the survivor of them, under sec. 49, had power to convey the farm, without the concurrence of the beneficiaries, he having agreed to sell and convey to one S. (3) That, for the greater security of the purchaser, a caution might be registered under the Devolution of Estates Act; and directions were given accordingly: see secs. 13, 14, 15, 19, 21, and 23 of that Act. (4) That the testator's primary intention was to treat his brothers and sisters and his wife's brothers and sisters as one aggregate, and to divide his property into as many shares as there were units in that aggregate. But he contemplated that all the beneficiaries might not be alive at the death of his wife, and the word "or," in the expression "or their heirs," should be read disjunctively; and so the right of each of the primary beneficiaries to take was not absolute, but contingent upon his being alive at the death of the testator's wife, the period of distribution. (4) That "brothers and sisters" included those of the half-blood. (5) That the persons entitled to share in the remainder were to be ascertained at the date of the death of the testator's wife; the property was to be divided into as many shares as there were brothers and sisters of the testator and his wife then alive and brothers and sisters who had died leaving "heirs" (issue) then alive; the aggregate of the "heirs" of any deceased brother or sister to take only the share the brother or sister would have taken had he or she survived; and that share to be distributed according to the number of the "heirs" in each case and their relationship to the person for whom they were substituted, according to the Statute of Distributions.

Re Waugh. Re Scott and Scott, 42 O.L.R. 87.

GIFT OF "BALANCE" OR RESIDUE — "MY HEIRS NAMED IN THIS WILL AS DEVISEES" —INCLUSION OF LEGATEES.

Re Bolton, 14 O.W.N. 87.

(§ III B—83) — WILL — GIFTS TO CHILDREN —GIFTS OVER IN EVENT OF CHILDREN DYING WITHOUT HAVING RECEIVED THEIR PORTION — CONTEST BETWEEN EXECUTORS AND CHILDREN OF DECEASED CHILD OF TESTATOR — EFFECT OF DIVESTING CLAUSE.

Re Mitchell, 14 O.W.N. 2.

BEQUEST OF BANK-SHARES TO EXECUTORS IN TRUST — INCOME TO BE PAID TO WIDOW FOR LIFE — AFTER DECEASE OF WIDOW SHARES TO BE DIVIDED AMONG CHILDREN "THEN LIVING" — DISTRIBUTION TO BE MADE AT DEATH OF WIDOW AMONG CHILDREN THEN LIVING — EXCLUSION OF REPRESENTATIVES OF CHILDREN PREDECEASING WIDOW.

Re Barnett, 14 O.W.N. 82.

BEQUEST TO INFANT — GIFT OVER IN EVENT OF DONEE SURVIVING TESTATOR AND DYING BEFORE ATTAINING MAJORITY — "AND" — "OR" — VESTED INTEREST NOT SUBJECT TO BE DIVESTED — DONEE SURVIVING TESTATOR AND BEING STILL AN INFANT.

Re Stamp, 14 O.W.N. 80.

EFFECT OF CODICILS — ESTATE — FEE SIMPLE — LIFE-ESTATE — REMAINDER — WILLS ACT, SEC. 31 — DEVOLUTION OF ESTATES ACT, SECS. 3 (1), 30, 31 — DEVISE TO "GRANDCHILDREN" OF CHILDREN READ AS DEVISE TO "CHILDREN" OF CHILDREN — CONTEXT — INTENTION OF TESTATRIX — TAKING PER STIRPES.

Re Armstrong, 15 O.W.N. 148, 271.

D. CHARITABLE BEQUEST OR DEVISE; RESTRICTIONS.

(§ III D—100) — BEQUEST TO PROVINCIAL TREASURER — CHARITY — PERPETUITY — LEGAL EFFECT — CORPUS — TRUST.

C., who died in 1913, by his will made in 1910, directed that all his estate, save that specifically dealt with, should be converted by his executors, and the proceeds paid to the Provincial Treasurer, under the provisions of the Ontario statute 9 Edw. VII., ch. 26, sec. 42, as amended by 10 Edw. VII., ch. 26, sec. 47, "for the permanent endowment of . . . a charitable object as hereinafter directed" and "shall be so paid for the purpose of being invested by him in Ontario Government stock as by the aforesaid Acts directed and the whole of the interest thereon shall be paid over as it matures in perpetuity to the Hospital for Sick Children:"—Held, that the gift of the income in perpetuity, without any restriction as to the purpose for which it was to be used, was in effect and in law a gift of the corpus. [Mayor etc. of Beverley v. Attorney-General (1857), 6 H.L.C. 310, 318, followed.] The intention of the testator must always be the guide in the interpretation of wills; but, when once the intention is clear, the legal effect of that intention must follow, even if it could be shewn that the testator did not know the effect in law of what he had directed. The statutes (since repealed and re-enacted in amended form by 5 Geo. V., ch. 20, sec. 25) merely constituted the Treasurer a trustee—the effect of the trust declared must be ascertained upon the ordinary principles.

Re Carter, 42 O.L.R. 57.

DESCRIPTION — REMUNERATION OF EXECUTORS — TRUST FOR CROWN.

By his will the testator gave the whole of his property to two persons as trustees and executors "for the purposes after-named." The whole estate was of the value of about $12,000. He then gave seven specific legacies, amounting in aggregate value to $9,300, to different charitable institutions. He made no disposition of the residue. He appointed the executors "for the consideration of 8 per cent. of the whole estate as set forth in this my will." The description in the will of the institutions to be benefited was inaccurate, and there was some uncertainty as to what institutions were intended. Upon evidence submitted, an order was made determining the objects of the testator's bounty. The clause above quoted was construed as giving the executors a commission of 8 per cent. on the whole estate as remuneration for their care, pains, and trouble. The testator, so far as known, was the last of his family; he was unmarried, and had no relations:—Held, that the provision made for the executors indicated that the testator did not intend them to take the residue beneficially; and, by virtue of sec. 58 of the Trustee Act, R.S.O. 1914, ch. 121, they held the residue in trust for the next of kin, who would take upon an intestacy, if there were next of kin; and, there being no next of kin, the executors held for the Crown. [Middleton v. Spicer (1783), 1 Bro. C.C. 201, followed.] Held, also, that the gifts of named amounts to named charities could not be construed as carrying with them a gift of the residue or surplus for distribution among the named charities; nor could a general gift for charitable purposes be implied; also, that there should not be a reference for the purpose of an inquiry as to claimants; any meritorious claim would, no doubt, be recognised by the Crown.

Re Aspel, 42 O.L.R. 191.

PERPETUAL TRUST FOR CARE OF GRAVE — LEGISLATIVE SANCTION — CEMETERY ACT.

A direction in a will to the executors to deposit a sum in a bank or invest it, "the yearly interest to be devoted to the care of my grave," creates, leaving statutory provisions out of consideration, a perpetual trust; and, as the purpose is not charitable, is void; but legislative sanction is given to this particular form of perpetual trust, by the Cemetery Act, R.S.O. 1914, ch. 261, sec. 14, especially sub-sec. 4; and, where there was such a direction in a will, it was declared that the executors might pay over the sum mentioned to the "owner," i.e., the person owning, controlling, or managing a cemetery (sec. 2 (c)), making an agreement with him as contemplated by the statute.

Re Jones, 42 O.L.R. 62.

BEQUEST OF RESIDUE TO CHARITABLE INSTITUTION — INACCURATE BUT SUFFICIENT DESCRIPTION — RESIDUE PAYABLE AFTER PAYMENT OF OTHER LEGACIES IN FULL — ABSENTEE LEGATEES — PRESUMPTION OF DEATH — LAPSED LEGACIES — BENEFIT OF RESIDUARY LEGATEE — DECLARA-

TION — DISTRIBUTION OF ESTATE — COSTS.

Sisters of St. Joseph v. Walsh, 15 O.W.N. 12.

CHARITABLE GIFTS — ESTATE OF TESTATRIX CONSISTING SOLELY OF MORTGAGE ON LAND — MORTGAGE DECLARED TO BE PERSONALTY — MORTMAIN AND CHARITABLE USES ACT, R.S.O. 1914, CH. 103, SEC. 2 (1) (c) — "MONEY SECURED ON LAND" — REPRESENTATION OF ESTATE OF ABSENTEE.

Re St. Amand, 15 O.W.N. 165.

MORTMAIN ACT—UNCERTAINTY.

Held, that the Mortmain Act (9 Geo. II., ch. 36), is not in force in Saskatchewan; that a bequest to a trustee "for Christian work or otherwise as she sees fit" is void for uncertainty.

Re Miller Estate, 11 S.L.R. 76.

E. WHAT PROPERTY PASSES.

(§ III E—105) — "WHOLE OF MY MONEY OF WHICH I DIE POSSESSED" — VESTED REMAINDER.

In 1882, K., by a trust disposition and settlement, directed her trustees to make payment, within twelve months after the death of her sister, to C., of a legacy of £800. K. died in 1885; C. in 1887; and K.'s sister in 1915. Some time after the last date, K.'s trustees paid the £800 to the administrators de bonis non with the will annexed of the estate of C. By the first paragraph of the will of C., he bequeathed to his wife "the whole of my money of which I die possessed to be used by her for the benefit of the family." He then bequeathed to his daughter certain books specifically described, and proceeded, "I bequeath to my eldest son . . . . the remainder of my personal effects," and added particular injunctions as to the care of a ring, military decorations, and documents:—Held, that the legacy from K. was money; it became vested in C. upon the death, in his lifetime, of K., although the payment was postponed; and, under the words "the whole of my money of which I die possessed," it passed to the widow of C.—the words "of which I die possessed" not limiting the bequest to money actually in hand at his death.

Re Cotter, 42 O.L.R. 99.

PROPERTY AS OF DATE OF WILL OR DEATH — "CONTRARY INTENTION" — WILLS ACT.

A testator, dying in 1912, by his will, made in 1907, gave his "house and premises on M. street" to his widow for life, and on her death or remarriage, to his children then living, and the residue of his estate to her absolutely. At the date of the will, the testator owned a house in M. street built on 20 feet of land; the testator afterwards purchased and owned at his death 55 feet to the west:—Held, a contrary intention not appearing by the will (sec. 27 of the Wills Act), that the will must be read as if it had been executed immediately before the testator's death, and the whole property in M. street passed under the devise. The established rule of construction is stated in Re Ingram (1918), 42 O.L.R. 95. When the thing given remains and has been added to between the date of the will and the date of the death, the whole property answering the description at the later date passes. [Re Willis, [1911] 2 Ch. 563; Re Portal and Lamb (1885), 30 Ch. D. 50; Morrison v. Morrison (1885), 10 O.R. 303; Hatton v. Bertram (1887), 13 O.R. 766, referred to.]

Re Rutherford; 42 O.L.R. 405.

WILLS ACT — CONTRARY INTENTION — "MONEYS OR SECURITIES FOR MONEY — —"OR" — "AND."

The testatrix died in January, 1917; her last will, which was proved, was made in 1906. Her husband predeceased her, dying in October, 1916; by his will, made in 1902, he left all his property to her. When the testatrix made her will in 1906, her property was of about the value of $400; at the time of her death, by reason of her husband's death and bequest, the value of her property was more than $10,000. She had three children; by her will she left small sums and certain chattels to her elder daughter and her son; to the younger daughter she left certain chattels and "all the rest residue and remainder of the moneys or securities for money I may die possessed of." By the Wills Act, R.S.O. 1914, ch. 120, sec. 27, "every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will:"—Held, that, although the effect of making the will speak as if made immediately before the death was greatly to increase the benefit conferred by the gift to the younger daughter, it could not be said that a contrary intention appeared by the will; and, therefore, the younger daughter took the bulk of the estate under the will. Principles deducible from the cases bearing upon the application of the statute stated. [Everett v. Everett (1877), 7 Ch. D. 428, 433, 434; Vansickle v. Vansickle (1884), 9 A.R. 352, 354, specially referred to.] Held, also, that the gift of the residue of "moneys or securities for money" was one; the younger daughter was not put to her election between "moneys" and "securities for money"; "or" might, if necessary, be read as "and"; the intention plainly was, that the residue of either "moneys" or "securities for money," and of both, after paying the small legacies, should pass.

Re Ingram, 42 O.L.R. 95.

SPECIFIC DEVISES OF DIFFERENT PORTIONS OF ONE FARM — DESCRIPTIONS IN WILL — ORAL EVIDENCE — CONFLICTING CONSTRUCTIONS — RATIONAL AND CONVENIENT DISPOSITION.

Re Mailloux, 14 O.W.N. 85, reversed in 15 O.W.N. 211.

G. NATURE OF ESTATE OR INTEREST CREATED.

(§ III G—125)—PRECATORY WORDS.

Mere precatory words in a will are insufficient to restrict a gift absolute, unless the intention to do so is clear.

Perry v. Perry (Man.), 40 D.L.R. 628, [1918] 2 W.W.R. 485, affirming 37 D.L.R. 89.

"HEIRS AND ASSIGNS" — FEE SIMPLE — INTEREST IN PERSONALTY — COSTS.

Where an estate is devised to the heirs of a person to whom a prior estate of freehold has been given, the heirs take by descent and not by purchase, and an estate in fee simple is created in the ancestor. [Van Grutten v. Foxwell, [1897] A.C. 658, followed.] The testator devised and bequeathed "two stores" and half of his other property to his granddaughter "to be held by her during her life and at her death to her heirs and assigns forever:"—Held, that the granddaughter took an estate in fee simple in the land devised. And held, that the chattel property bequeathed to the granddaughter became hers absolutely by the terms of the bequest: the testator meant that the land and goods should go in the same manner; and, as the land, by force of the rule of law, became the granddaughter's absolutely, so did the goods. [Comfort v. Brown (1878), 10 Ch. D. 113; De Beauvoir v. De Beauvoir (1852), 3 H.L.C. 524, applied.] In the peculiar circumstances of the case, no order was made as to the costs of a summary application for the determination by the Court of the questions arising as to the construction of the will.

Re Kendrew, 43 O.L.R. 185.

GIFT OF RESIDUARY ESTATE — LIFE-ESTATE — ENJOYMENT IN SPECIE — RIGHT TO ENCROACH UPON CORPUS — GIFT OVER ON TERMINATION OF LIFE-ESTATE.

Re Hodgkins, 14 O.W.N. 105.

(§ III G—135) — TRUST — REMAINDER — LUNATIC — RIGHT TO RECEIVE FUND — STATUTORY COMMITTEE — HOSPITALS FOR INSANE ACT.

The testatrix, dying in 1903, by her will and a codicil, divided her estate equally between her son and daughter, her only children. One share was to be held by the defendant, the trustee under the will, and the income was to be paid to the son until he attained the age of 34 years, when he was to receive the corpus. The other share was to be held by the trustee, and the daughter was to receive the income until she reached the age of forty years, when she was to receive the corpus. If either child died before the date for payment of the corpus, leaving issue, the issue was to take. In case either died without issue before the period for payment of his or her share, the share of the one so dying was to form part of the share of the survivor and to be dealt with in the same way. It was directed that the property of the testatrix was to be converted into money; and the disposition was subject to a provision that if, by reason of alienation, bankruptcy, or other specified means, or by any other means whatsoever, the money or income could no longer be personally enjoyed by either child, his or her right to receive the money or income should cease, but the trustee might, "in his absolute and uncontrolled discretion," pay over to or expend for the benefit of the child so much of the money or income as he should think fit. By the final clause of the will it was directed that money remaining "after the death of said child shall be disposed of in the same manner as the principal share of the said child hereinbefore directed to be set apart for said child is disposed of after the death of said child." The son was insane, was admitted to a public asylum in June, 1905, and died there in January, 1915, unmarried, being then 35 years old. The daughter was also insane, was admitted to the same asylum in March, 1909, and at the time of the trial of this action was still there as a patient, being 34 years old. Nothing had been paid for the maintenance of either of the patients in the asylum; and considerable sums were due to the Crown therefor. The Inspector of Prisons and Public Charities, as administrator of the estate of the son and statutory committee of the estate of the daughter, claimed a declaration of their rights under the will and payment by the defendant, as trustee under the will, of the sums due to the Crown. Held, that, upon the true construction of the will, if the son or daughter died leaving issue, the issue would take; if without issue, the survivor would take. The earlier provisions related to death before the period of payment. The final clause was intended to make the same provision in the event of death after the period for payment when payment was withheld by reason of any of the matters mentioned. (2) There being, in the case of the child who should first die, a gift over, the clause was valid as to the share of that child; but, there being no gift over in the case of the surviving child, the clause was as to that child's share invalid and inoperative. There was, in the earlier part of the will, a gift to the daughter, and that could not be cut down by any provision which did not divest the property given to her. (3) If there could be any construction of the will by which the gift to the daughter would be rendered inoperative, there would be an intestacy, and the son and daughter would, on the death of the testatrix, have taken vested interests, and the daughter as next of kin of the son would have taken the whole. In this view, the daughter's interest would pass under the control of the plaintiff, as statutory committee, and the defendant would have no right to retain it as against the plaintiff. (4) If the final clause was valid, the events which had happened brought it into operation, and the income of the estate—all belonging to the daughter—might, in the absolute and uncontrolled discretion of the defendant, be expended for the benefit of the daughter. (5) But this dis-

cretion may be reviewed by the Court. Where there is a trust, coupled with a discretionary power, the Court is entitled and bound to interfere when there is no attempt to exercise the discretion for the purpose for which it was given, but an attempt to accomplish a purpose alien to the intention of the author of the power. In this case, the defendant, by refusing to pay anything for the maintenance in the public asylum of the son or daughter, and so allowing the fund in his hands to accumulate for the benefit of the daughter's heirs, was failing to exercise the discretion and power imposed upon him by the will. (6) That the fund must be transferred to the plaintiff in pursuance of the provisions of the will and of the Hospitals for the Insane Act, R.S.O. 1914, ch. 295, sec. 32 et seq.

Dunlop v. Ellis, 41 O.L.R. 303.

EVENT OF CHILDREN DYING WITHOUT HAVING RECEIVED PORTIONS — INTENTION — PERIOD OF DIVISION.

The testator, dying in 1887, by his will set apart his house as a home for his wife and family, and then gave all his estate to his executors in trust to convert and use for the maintenance of his wife and family, and to pay certain sums to his sons, and, at such time after the expiration of five years from his decease as might seem advisable to the executors, to divide among all his children share and share alike, all his estate, save such portions as the executors might retain to provide from the interest for the wife and family residing in the homestead, any balance of income being divided yearly among all his children. The will further provided that on the death of the widow the income should be divided until the time for division previously referred to; and "in case any of my children should die without having received his or her portion . . . and leaving issue him or her surviving at the time a division of the estate shall be made among my children the child or children of such of my children so dying shall represent and receive their deceased parent's share but if any of my children should die leaving no issue him or her surviving the share or portion herein given . . . to such child shall revert to and become part of my estate and be equally divided among all my surviving children." The executors kept the estate intact until the widow died (in 1917 or 1918), and after her death paid over to the executors of a son, who had died in 1907, leaving children, a sum representing part of his share in his father's estate:—Held, that the children of the deceased son took under the will of their grandfather, whose executors ought to have paid to those children the sum aforesaid. The gift was to the children of the testator, subject to be divested in favour of the child or children of such of the testator's children as should die before the actual receipt of their shares, leaving children surviving. Where the testator has intended the gift over to take effect, and there has not been actual payment, effect must be given to that intention; [Kirby v. Bangs (1900), 27 A.R. 17, 29 Johnson v. Crook (1879), 12 Ch. D. 639, followed.]

Re Mitchell, 42 O.L.R. 340.

DEVISE OF LAND — RESTRAINT UPON ALIENATION — INVALIDITY — TITLE TO LAND — VENDOR AND PURCHASER.

Re Huron and Erie Mortgage Corporation and Coghill, 13 O.W.N. 442.

DEVISE TO SON — LIMITATION — "DEATH WITHOUT ISSUE" — ISSUE SURVIVING SON — ORIGINATING NOTICE — RULE 604 — WILLS ACT, SEC. 33 — COSTS.

Re Ronson, 15 O.W.N. 1.

BEQUEST OF INCOME TO DAUGHTER—DEATH OF DAUGHTER BEFORE DEATH OF TESTATOR—RESIDUARY DEVISE TO DAUGHTER —DECLARATION AGAINST LAPSE—WILLS ACT, SEC. 37.

Re Heal, 13 O.W.N. 285, 14 O.W.N. 15.

RESIDUARY DEVISE — TRUST — INTENTION.

A testator devised all his residuary estate to A., to have and to hold the same unto A. forever, coupled with a limitation that A. should execute and carry out any request and directions which the testator might give A. respecting the property devised, by a document under his hand and seal. Held, on appeal, reversing the judgment of Sir E. McLeod, C.J., that the testator, having died without making any request or giving any directions, A. took the property beneficially and not as trustees for the next of kin.

McHugh v. McGuire, 45 N.B.R. 167.

(§ III G—140) — VESTED REMAINDER — TRUST — BEQUEST TO WIFE.

A will directed the trustees thereunder to set aside a sufficient portion of the trust premises to produce a certain income for the testator's parents and next directed that, after such portion had been set aside, one-fourth of the remainder of the trust premises should be paid to each of his two daughters and that, after the foregoing gifts had been set aside, the remainder of the trust premises should be paid to the wife and, in the event of his wife dying before his decease or "before receiving this bequest," then said remainder should be paid to the daughters. The wife died before receiving the bequest and before the property to supply the fund for the benefit of the father and mother had been set aside by the trustees. Held, that the bequest to the wife had not become vested in her. [West v. Miller, L.R. 6 Eq. 59; Hayward v. James, 28 Beav. 523, referred to.]

Re Gardner Estate (B.C.), [1918] 3 W.W.R. 65.

H. ENJOYMENT; PAYMENT.

(§ III H—170) — PECUNIARY LEGACIES — PAYMENT — MIXED FUNDS — REALTY AND PERSONALTY.

The general rule of law as to pecuniary legacies in the absence of sufficient indication of a contrary intention, is that they are

payable by the legal personal representatives of the testator out of the personal estate not specifically bequeathed. Unless charged upon it by the will they are not payable out of the real estate: [Robertson v. Broadbent, 8 App. Cas. 812.] Where a testator is minded to make his real estate, in addition to his personal estate, assets for the payment of debts and legacies, or either of them, the presumption is that the real estate is made an auxiliary fund, only secondarily liable to the personal estate, which still retains its primary liability. It is absolutely necessary, therefore, not only to have an expression of oneration of the real estate, but also a sufficient exoneration of the personal estate, either wholly or partially, before there can be any interference with the ordinary rule for the applications of assets. This expression of oneration and exoneration may be found if the Court, after looking at the whole will, is convinced that there was an intention on the part of the testator that not only the real estate should be onerated, but that personal estate should be exonerated: Allan v. Gott, L.R. 7 Ch. 439; per Sir W. M. James, L.J.

Re Lord Strathcona's Estate (Man.), [1918] 2 W.W.R. 499, 28 Man. L.R. 579.

I. Election; acceptance.

(§ III I—175) — Election — Maintenance —Mortgage.

Where a testator devises property in trust for the maintenance of his son, a lunatic, and also a specific sum to the son absolutely, and by the same will he devises to another person a mortgage which he had assigned to the son, the latter, or his committee, by virtue of the equitable doctrine of election, are bound to elect between the mortgage on one hand and the benefits under the will on the other.

Rosborough v. Trustees of St. Andrew's Church, 38 D.L.R. 119, 55 Can. S.C.R. 360, affirming 30 D.L.R. 391, 44 N.B.R. 153.

K. Charge upon donee or land devised.

(§ III K—185) — Power of executor to sell—Trustee Act.

An executor held to have been vested with an implied power to sell certain of his testator's real property, and a proposed sale thereof approved. A codicil to a will contained the following clauses: "I bequest income of the property of the Grand View Hotel, Brandon, to Mrs. Blanche Donohue, after her death property or money to go to Alfred St. Amour. I bequest Mrs. Blanche Donohue to pay Mrs. Lucy May Ingo $5,000 on the sale of Grand View hotel property or until that time $20 a month." The Court approved of a sale of the hotel. Held, that the gift to Mrs. D. must remain untouched so far as Mrs. I. was concerned, that is, that the request or bequest in favour of Mrs. I. failed.

Re Boisseau Estate (Man.), [1918] 3 W.W.R. 668.

Maintenance — Breach of duty — Forfeiture — Removal.

A legatee who does not fulfil the duties and obligations to which he is bound by the will may have his legacy declared forfeited or reduced. When a legatee is charged to house, feed, clothe and furnish the other things necessary to a minor, on condition that the latter works for him until of age, all the charges on the legatee may be converted into money if the legatee refuses or neglects to fulfil the obligations, or if it becomes impossible for the minor to live with the legatee. A universal legatee charged with a particular legacy to a minor, with an obligation to house, feed and maintain him, and who is at the same time appointed testamentary executor, is not subject to be removed from that position, and, as he has not complied with the provisions of the particular legacy, the Court converts into money the obligations he had to fulfil to the minor.

Houde v. Mainville, 24 Rev. Leg. 153.

L. Lapsing; ademption; deduction; revocation; renunciation.

(§ III L—190) — Widow's annuity declared first charge on net income of residuary estate — Deficiency — Resort to corpus — Abatement of legacies.

Re Daly, 15 O.W.N. 32, 97.

(§ III L—196) — Specific legacies — Description of property — Charge on land.

The estate of the testator, who died in England, consisted of two small sums of money in England, a considerable sum in a bank in Ontario, and valuable real estate in Ontario. By his will he appointed an executor, and gave him $1,000. He gave his cousin in England (who predeceased him) an annuity of $600, to be provided from the rents of the real estate in Ontario—"my nephews to whom . . . I bequeath that property contributing this charge in such proportion as they shall mutually agree or . . . as my executor shall deem just." He then gave to the same cousin all his property in England. Then followed a legacy of $5,000 to his niece; and then—"Subject to the above-mentioned charges, I give . . . to my nephews . . . my real property" in Ontario. There were two nephews; to one three-fifths of the property was given and to the other two-fifths. Lastly, he directed that "all other property than the above-mentioned which I possess in Canada" should be divided equally between three named persons:—Held, that, though the annuity was made a charge upon the real estate, the legacies of $1,000 and $5,000, notwithstanding the use of the plural in the words "subject to the above-mentioned charges," were not so made a charge. The bequest of the property in England was a specific legacy. The residuary bequests were not specific, and had not priority over the pecuniary legacies of $1,000 and $5,000. A

gift of "my property at A." is specific. The words "in Canada" at the end of the residuary bequest were not added with the view of making the gift specific, but because all in England had already been given.

Re Newcombe, 42 O.L.R. 590.

IV. Suit to construe or reform.

(§ IV—200) — INTERPRETATION — INTENTION.

Where the wording of a will is clear the Court must interpret it as expressed, effect cannot be given to a probable intention.

Auger v. Beaudry and Hyde, 43 D.L.R. 65, 27 Que. K.B. 461.

WINDING-UP.

See Companies, VI.

WITNESSES.

I. COMPETENCY.
A. In general.
B. Husband or wife.
C. Effect of death.
II. EXAMINATION.
A. In general.
B. Cross-examination.
C. Privilege.

Annotations.

Competency of wife in crime committed by husband against her; criminal non-support; Cr. Code, sec. 242a: 17 D.L.R. 721.

Medical expert witnesses: 38 D.L.R. 453.

Proof of handwriting and questioned documents: 44 D.L.R. 170.

I. Competency.

See Evidence.
Witness fees, see Costs.

II. Examination.

See also Discovery.

(§ II A—30) — EXPERT WITNESS — HYPOTHETICAL QUESTION.

It is not necessary to embody in a question put to an expert as a hypothetical question all the facts relating to the subject upon which the opinion of the witness is asked. It is sufficient that one fact which has been proven, or more than one, be stated to the witness, and he is told to assume the truth of the fact stated, and his opinion is asked upon it.

Wilson v. Bell, 45 N.B.R. 442.

(§ II A—32) — REFRESHING MEMORY — CONSISTENCY OF STATEMENTS.

For the purpose of rehabilitating a witness, and shewing that he is consistent with himself, evidence may be given to shew that the witness had made the same or substantially the same statement as that given in his testimony, prior to the inconsistent statement. [Rex v. Benjamin (1913), 8 Cr. App. R. 146; Reg v. Coll (1889), 24 L.R. Ir. 522, considered. See also Rex v. Anderson, 16 D.L.R. 203, and annotation following.]

Rex v. Neigel, 39 D.L.R. 154, 13 A.L.R. 137, 29 Can. Cr. Cas. 232, [1918] 1 W.W.R. 477.

C. Privilege.

(§ II C—45)—SELF INCRIMINATION.

The right of a witness to refuse to answer questions put to him, on the ground that his answer might tend to criminate him is a civil right which has been taken away from him by the Ontario Evidence Act, R.S.O. 1914, ch. 76, sec. 7, in respect of civil matters.

Re Ginsberg, 38 D.L.R. 261, 40 O.L.R. 136; 12 O.W.N. 284, reversing 27 Can. Cr. Cas. 447.

TO DIVULGE SECRETS OF STATE — MILITARY SERVICE ACT.

A Court cannot compel a witness, who is a subordinate of the Minister of Justice, to answer questions put to him, when he has received instructions from the Minister to state only the number of men actually on active service under the Military Service Act, 1917, and amendments, is under 100,000, and to refuse to reply to any other questions tending to divulge administrative acts of the state, with regard to the military service of Canada.

Rheault v. Landry, 20 Que. P.R. 187.

WOMEN.

See Husband and Wife.

WORDS AND PHRASES.

About....144, 230
Absence or inability to act....178
Absent without leave....397
Absolute....35
According to plans....155
Action for the recovery of land....356
Actual cost....493
Actual need....325
Actual value....544, 545
Agreement....155
And not before....330
And proceedings thereof in this action....166
Any Judge of the Supreme Court....97
Appear....181
Approximate....144
A right of action cannot arise out of fraud....137
Arson, defence of....28
Ascendant relative....199
Ascendants....270
Attempt....1
At the suit of....3
Attributive....67
Blended....319
Board of Governors....480
Bonus....517
Borrowing shares....69
Causa mortis....291
Cause of action upon contract....614
Cede....200
Chauffeur....49
Closing out....69
Coast line....200
Commission on each sale secured....475
Common rights....454
Conditions....616
Copy....94
Cut....85
Damage....486

Day ... 172
Decision on a point of law when the facts are admitted ... 171
Desert ... 397
Direct loss ... 304
Disqualified ... 447
Enemy ... 8
Entitling ... 211
Every general meeting of the company shall be held within the province ... 103
Exceptional tax ... 541
Excessive rate of speed ... 49
Fair actual value ... 14
Fair market value ... 548
Finally dispose of action ... 14
Fishing stores ... 516
For trespass ... 3
F.o.b. cars ... 143
Futures ... 69
Garage ... 50
Garbage ... 126
Good and special reasons ... 24
Good cause ... 181
Gross negligence ... 285, 436
Guilty ... 189
Guilty without his knowledge ... 561
Half of all expenses ... 346
Have appeared before us ... 200
Having liquor in a place other than a dwelling house ... 321
Having same interest ... 452
Heard ... 186
Heirs and assigns ... 603
His Majesty ... 525
I promise ... 61
If it appear to judge ... 181
If the assignee sells the business . . . he shall have the right to transfer his lease ... 348
Incidental ... 28
Indicative ... 67
Inexcusable fault ... 384
Infants ... 310
Insurable interest ... 304
Intoxicating Liquor Act, 1916 ... 91
Invitation ... 531
In the city ... 140
Issued to meet water competition ... 80
It is further agreed . . . that the principle is $700 and the rate of interest . . . 10 per cent ... 318
Joint section ... 89
Judgment ... 42
Just and convenient ... 205
Justice of the case ... 19
Labourers, servants and apprentices ... 107
Lay ... 516
Legal and testamentary estate ... 391
Liquidated damages ... 144
Liquor ... 324, 327
Locum tenens ... 57
Made ... 263
Maintain anew ... 120
Marking up ... 69
Mechanic ... 49
Might notify ... 69
Milk-dealer ... 150
Mill-run ... 135
Moneys or securities for money ... 602
Mortgage or charge ... 104
Mountain scale of tolls ... 77
Murder ... 187
Necessary ... 171
No commission to be paid until the amount of the loan is received ... 70
No one alleging his own baseness is to be heard ... 137
Not guilty ... 189
Not to receive title to said property until the full amount has been paid ... 359
Notwithstanding what is within written ... 306
Occupant ... 546
On a public work ... 430
One ... 62
On, in or about a factory ... 381
Other officer or servant ... 207
Other reasons ... 255
Penalty ... 144
Person ... 540
Person interested ... 254
Person not entitled to sell liquor and who sells such liquor ... 322
Personal estate ... 310
Previously chaste character ... 518
Private dwelling house ... 326
Property and civil rights ... 128
Protracted and vexatious litigation ... 194
Public harbours ... 278
Purporting to be made ... 263
Really ... 55
Recognized as duly ordained ... 57
Removed by certiorari ... 95
Res judicata ... 340
Right to the possession of the same ... 184
Rock ... 147
Shall have all public halls, stairways, and passageways properly lighted ... 413
Signed by party to be charged ... 137
Specifications ... 143
Split switch ... 491
Spread ... 85
Subsidies ... 493
Substantial ... 14
Such rate or rates ... 69
Sufficient evidence ... 228
Sum in dispute ... 527
Summary ... 4
Supplying gas throughout a city ... 421
Striking any portion of the road-bed ... 308
The first $75,000 collected on account of policies ... 309
The lessor will not be bound to make any repairs ... 349
The mayor remains in office . . . until his successor is sworn in ... 414
The mortgagors covenant . . . that the mortgagors will pay the mortgage money ... 403
Theft ... 187
Time to time, notify from ... 69
Title by possession ... 572
To do any or all of the above things in any part of the world ... 103
To pay on demand or at a fixed or determinable future time ... 59
Transfer ... 200, 483
Transient trader ... 418
True and actual cash value ... 305
True value ... 14
Two-thirds of the cash value ... 305
Until paid ... 318
Way ... 200

We promise to pay 58
While occupied as a dwelling 306
Whole of my money of which I die possessed 601
Wilful act or omission 490
Wilful act or omission of owner 10
With interest 64
Without prejudice 204

WORKMEN'S COMPENSATION.

See Master and Servant, V—340.

Annotation.

Quebec law on workmen's compensation: 7 D.L.R. 5.

WRIT AND PROCESS.

I. In general.
II. Service.
A. In general; on non-resident.
B. On corporations.
C. By publication; substantial service.
D. Privilege; exemption.
E. Liability for serving.
III. Return; proof; setting aside writ or service.

I. In general.

Various writs and orders, see Motions and Orders; Execution; Attachment, Garnishment, Injunction; Mandamus; Prohibition; Quo Warranto; Certiorari; Habeas Corpus.

(§ I—2) — Form — Service — Essentials —Validity.

Bailiffs can only serve writs within the limits of the district for which they have been appointed; it is necessary, therefore, to understand by the words "or in any other district" of art. 121, C.C.P. (Que.), the exception intended in the said art. 7608, R.S.Q., when it says "and in other districts in the cases provided by law." The authority of the bailiff should appear on the very face of the writ of summons, by stating the district for which he is registered. That part of Form 2 of the appendix to the Rules of Practice, according to which the writ of summons is addressed to the defendant himself instead of to the sheriff or a bailiff of the district where he is to be served, does not agree with the provision of art. 121, C.C.P., and, consequently, it is beyond the power of the judges of the superior court to make a similar form. The notice to the defendant, in the writ, that if he does not appear judgment will be given against him by default, appears to have been inserted in the form of summons many years ago, in order to avoid subsequent writs of the English procedure of that period. A notice to the defendant "that in default of his doing so," of appearing, judgment will be given by default, is essential. The mention in the writ of the district in which it must be served, the order given to the sheriff or a bailiff of the district enjoining him to cite the defendant to appear, and the notice to the latter "that on default of his doing so" judgment will be given against him by default, are three elements essential to the validity of the writ of summons, and their omission constitutes a violation of substantial formalities which involve the nullity of the proceedings.

Reford v. The Stadium, 20 Que. P.R. 150.

Writ of summons — Address of plaintiff not set out — Application to set aside writ — Conditional appearance entered without leave — Effect of.

Buscombe Securities Co. v. Windebank and Quatsino Trading Co. (B.C.), [1918] 3 W.W.R. 582.

II. Service.

A. In general; on non-resident.

(§ II A—16) — Foreign defendants — Service out of province — Calls on company-shares — "Cause of action upon contract" — Conditional appearance.

The order of Clute, J., 40 O.L.R. 467, refusing to set aside the service of notice of the writ of summons on the defendants S. out of Ontario, was reversed, upon the appeal of that defendant, and the service set aside (Meredith, C.J.C.P., dissenting). The plaintiffs appealed from the same order in so far as it provided that the defendant should have leave to enter a conditional appearance: upon that appeal no order was made except that the plaintiffs should pay the costs of it. Held, per Riddell, J., that a foreigner not resident in Ontario is not subject to the jurisdiction of the Courts of Ontario primâ facie, and should not be debarred from setting that up, as he would be (so far as Rule 25 is concerned) if he entered the ordinary appearance. If the service out of Ontario were allowed, the order giving leave to enter a conditional appearance should stand. Under Rule 25 (1) (h), in order that service out of the jurisdiction may be allowed, "a good cause of action against the defendant upon a contract" must be shewn. These words mean the same as the words in the English Rule, "founded on any breach . . . of any contract." The cause of action here—the plaintiffs claiming merely a declaration that shares in their company held by the defendants were assessable and subject to call—was not founded on a breach of a contract. It was not an action upon a contract at all; that is, it was not an action to enforce a contract or to obtain damages for breach of a contract. [Hughes v. Oxenham, [1913] 1 Ch. 254, followed.] Again, under Rule 25 (1) (h), the defendant must have "assets in Ontario," of a certain value, "which may be rendered liable for the satisfaction of the judgment"—that is, the judgment to be obtained in the action. It is only such actions as can result in a judgment upon which the "assets in Ontario" can be applied which are in contemplation in this clause. Upon the judgment here sought no assets could be applied. The assets might be applicable for the satisfaction of a judgment for costs; but the costs of the action are not part of the claim in the action nor of "the cause of action." Per Lennox and Rose,

JJ.:—Under Rule 25 (1) (h), an order allowing service out of Ontario may be made if (1) it appears that the plaintiff has a good cause of action upon a contract, and (2) that the defendant has assets in Ontario which may be rendered liable for the satisfaction of the judgment. The two things must concur. Even if the right to come to the Court (Judicature Act, sec. 16 (b)) for a declaration as to the effect of a contract is a cause of action upon the contract (and semble it is not), there could be no assets liable for the satisfaction of a judgment simply declaring the right. The judgment might order the defendant to pay the costs, and the assets could be rendered liable for that part of the judgment; but the plaintiff had no present cause of action for costs, and it was a present cause of action that the Rule required him to shew—some breach of contract which had given rise to a right to have satisfaction out of the defendant's assets. The defendant was entitled to more than leave to enter a conditional appearance. The facts being admitted, and it being considered that the case did not come within the Rule, the proceedings should be stopped in limine. Per Meredith, C.J.C.P.:—The action was one "upon a contract"; if the plaintiffs should succeed and have judgment for their costs, the assets would "be rendered liable for the satisfaction of the judgment." Every person who brings an action of any kind sues for the costs of the action. Costs are as much a part of the judgment as damages. The words "liable for the satisfaction of the judgment" mean "exigible under a plaintiff's execution." The order refusing to set aside the service should be affirmed. The defendant should not have leave to enter a conditional appearance. The dilatory defence raised by the motion to set aside the service should be disposed of in limine.

Superior Copper Co. v. Perry, 42 O.L.R. 45, reversing, in part, 40 O.L.R. 467.

INTERPLEADER ORDER—SERVICE ABROAD.

Upon the application of the plaintiff, an order was made by a Judge permitting the applicant to pay into Court the amount of two promissory notes, made by him, held by B. in a foreign country, where he lived. The notes were given in Ontario in payment for a block of shares in an incorporated company, and the order purported to rectify the share-register of the company, by substituting the name of the plaintiff for that of the defendant as the owner of the shares. The order also directed the trial of an interpleader issue as to the money in Court, and that B. should be plaintiff in the issue. The order was made after a notice of motion had been served on B., in the foreign country where he lived, informing him that a motion would be made for an order authorizing the plaintiff to pay into Court the amount owing upon the two notes, and directing the Registrar of the Court to execute a transfer to the plaintiff of the shares in the company, "and for such further or other order" as might seem just. No permission was obtained from the Court to issue or serve this notice abroad; and, B. not appearing on the return, the order was made in his absence:—Held upon B.'s application to set aside the order, that, the service of the notice being unauthorized, it was void as process; that, if treated as informal notice, it gave no correct information as to what the Court was asked to do, and was, as to the matters complained of, no notice at all; and, therefore, the order was an ex parte order within Rule 217, and should be set aside. Under Rules 25 and 3 (b), (j), a notice may be served out of the jurisdiction in interpleader; but the notice is to be in the form settled by the terms of Rules 629 and 630; and Rule 630 indicates the extent and nature of the relief that can be obtained against a non-appearing claimant. Assuming that there was a foundation for an interpleader order, the order went beyond the relief which the Court was competent to grant against an absentee claimant. Order of Latchford, J., reversed.

Willard v. Bloom, 41 O.L.R. 1,

WRIT OF SUMMONS — FOREIGN DEFENDANTS —SERVICE OF NOTICE OF WRIT OUT OF ONTARIO — ONTARIO COMPANIES ACT, SEC. 151, SUB-SECS. (6) AND (7), ADDED BY 8 GEO. V., CH. 20, SEC. 30—ACTION BY MINING COMPANY—CALL ON SHARES —"CONDITIONS" OF SERVICE—RULES 25-30—VALIDITY OF CALL—APPLICATION OF NEW SUB-SECTIONS—SPECIAL ACT, 7 EDW. VII., CH. 117—STATUTORY POWER TO MAINTAIN ACTION—DETERMINATION AT TRIAL — JURISDICTION — CONDITIONAL APPEARANCE.

Superior Copper Co. v. Perry and Sutton, 15 O.W.N. 104.

SERVICE OUT OF JURISDICTION—AFFIDAVIT.

A good cause of action must be shewn in support of an application for an order for service of a writ of summons ex juris.

Royal Bank of Canada v. Skeans (No. 1), 24 B.C.R. 190.

SERVICE OUT OF JURISDICTION — DEBT OF RESIDENT.

A debt due from a resident of Manitoba to a person residing elsewhere is an asset within said province within the meaning of rule 291 of the King's Bench Rules and, therefore, a ground for allowing service of a statement of claim to be made upon the creditor outside of Manitoba in an action brought against him in Manitoba. [Brand v. Green, 13 Man. L.R. 101, applied; Love v. Bell Piano Co., 2 A.L.R. 209, 10 W.L.R. 657, not followed.]

Woodward & Co. v. Koeford (Man.), [1918] 3 W.W.R. 945.

B. ON CORPORATIONS.

(§ II B—28) — AGENT — CARRYING ON BUSINESS — LEAVE TO APPEAL.

An action was brought in the Supreme Court of Ontario against a railway company and a foreign steamship company for breach of duty in or about the carriage of goods. The writ of summons was served upon B.,

in Toronto, Ontario, as representing the steamship company. B. was the agent or representative in Toronto of a Canadian company, having its head office in Montreal, and that company was the agent in Canada of the foreign steamship company. Neither B. nor the Canadian company had anything to do with the arrangements for the shipping of the goods in respect of which the action was brought. It appeared that the agency of the Canadian company for the steamship company was of a limited kind: it did not make contracts with shippers or passengers except on specific instructions, but received requisitions and forwarded them to the steamship company in New York:—Held, by Masten, J., in Chambers, that the Canadian company, through B., transacted or carried on some business in Ontario for the steamship company, within the meaning of rule 23, and therefore the service upon B. for the company was good service. Difference between rule 23 and the English Order IX., rule 8, pointed out. [Okura & Co. v. Forsbacka Jernverks Aktiebolag, [1914] 1 K.B. 715, distinguished.] Held, by Riddell, J., in Chambers, refusing a motion (under rule 507) for leave to appeal from the order of Masten, J., that there was no good ground to doubt the correctness of the decision.

Ingersoll Packing Co. v. N.Y.C. and H. R. R. Co. and Cunard Steamship Co., 42 O.L.R. 330. [See 13 O.W.N. 481, 14 O.W.N. 134.]

III. Return; proof; setting aside writ or service.

(§ III—55) — RETURN — SATURDAY — EXTENSION OF TIME.

If the delay of 3 days given to the plaintiff by art. 154, C.C.P., to obtain permission to return a writ of summons which has not been returned on the day fixed, expires on a Saturday, permission should be asked for within such 3 days; the delay is not extended to Monday.

Duval v. Wade, 19 Que. P.R. 177.

CONTEST OF RETURN — PRACTICE — CERTIFICATION.

The return by a bailiff is authentic and all statements therein are presumed true, so far as they are not contested with the permission of the Court in the manner laid down in art. 236, C.C.P. (Que.); and this procedure is imperative. Unless the defendant has suffered injustice or grave prejudice, from a copy of a writ not having been duly certified, such omission or irregularity does not give rise to an exception to form, especially if the defendant has appeared within the legal delays.

Quebec Heights, Ltd., v. O'Byrne, 20 Que. P.R. 238.

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